CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes technique et bibliographiques

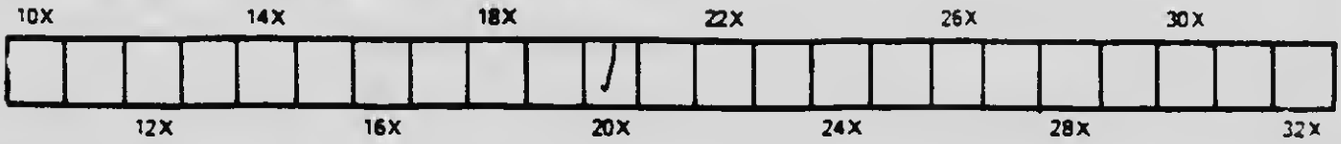
The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming are checked below.

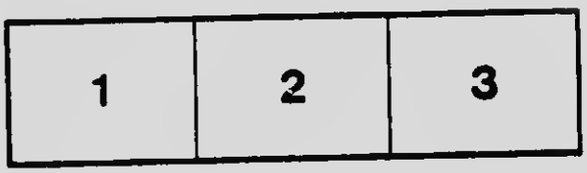
- [x] Coloured covers / Couverture de couleur
- [ ] Covers damaged / Couverture endommagée
- [ ] Covers restored and/or laminated / Couverture restaurée et/ou pelliculée
- [ ] Cover title missing / Le titre de couverture manque
- [ ] Coloured maps / Cartes géographiques en couleur
- [x] Coloured ink (i.e. other than blue or black) / Encre de couleur (i.e. autre que bleue ou noire)
- [x] Coloured plates and/or illustrations / Planches et/ou illustrations en couleur
- [ ] Bound with other material / Relié avec d'autres documents
- [ ] Only edition available / Seule édition disponible
- [ ] Tight binding may cause shadows or distortion along interior margin / La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure.
- [ ] Blank leaves added during restorations may appear within the text. Whenever possible, these have been omitted from filming / Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [ ] Additional comments / Commentaires supplémentaires:

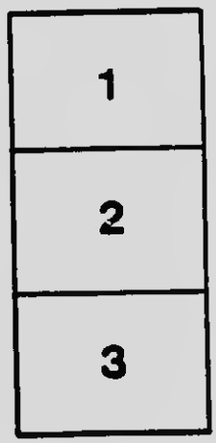
L'Institut a microfilmé le meilleur exampiaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modifications dans la méthode normale de filmage sont indiqués ci-dessous.

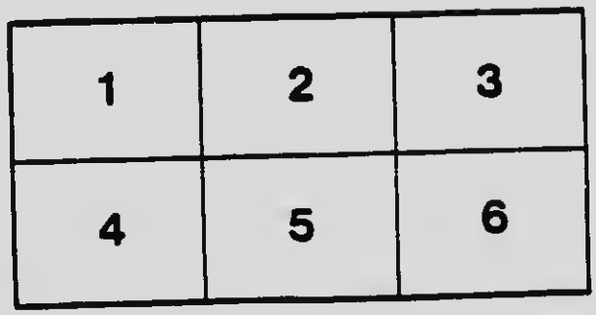
- [ ] Coloured pages / Pages de couleur
- [ ] Pages damaged / Pages endommagées
- [ ] Pages restored and/or laminated / Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed / Pages décolorées, tachetées ou piquées
- [ ] Pages detached / Pages détachées
- [x] Showthrough / Transparence
- [ ] Quality of print varies / Qualité inégale de l'impression
- [ ] Includes supplementary material / Comprend du matériel supplémentaire
- [ ] Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image / Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.
- [ ] Opposing pages with varying colouration or discolourations are filmed twice to ensure the best possible image / Les pages s'opposant ayant des colorations variables ou des décolorations sont filmées deux fois afin d'obtenir la meilleur image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.









APICES JURIS

AND

OTHER LEGAL ESSAYS

IN PROSE AND VERSE

BY

CHARLES MORSE, D.C.L.

TORONTO:
CANADA LAW BOOK COMPANY,
1906.

IT IS THE AUTHOR'S PRIVILEGE

TO DEDICATE THIS BOOK

TO

The Honourable Charles Fitzpatrick, K.C.

MASTER OF JUSTICE

and

HIS MAJESTY'S ATTORNEY-GENERAL

of

CANADA.

FOREWORD

IF an apology for its existence is needful on behalf of this volume, consisting in the main of previously published writings, the author would adopt for the purpose the charmingly ingenuous confession of Monsieur Ernest Gagnon in his *Choses d'Autrefois:* "Que si l'on me demande pourquoi je réédite ces pages, je répondrai dans la langue du Dante—

E l'amore che mi fa parlare.

C'est l'amour qui me fait donner une vie nouvelle à des articles voués à l'oubli."

This book is not a very large one, but it bulks in one respect, namely, variety of contents. In glancing over it the author is affrighted at the spectre of heterogeneity that arises from its pages. But, on the other hand, the book extends itself wholly within the domain of the literature of the law; and it may well be that this very diversity will prove its fortune at the hands of the profession in the mass. There is an attempt to provide matter fittingly serious for him who thinks the hard science of the law has no lightsome side; while there is a fair portion for those who hold to the view that waters from the fountain of Justice may be improved, upon occasion, by the process of aëration. Hence it is hoped that the tide upon which this entirely new departure in Canadian legal

literature is launched will not turn out to be that of 'sullen Lethe,' but the sort which, taken at the flood, leads on to more than dreams of royalty cheques and pleasant demands for new editions.

The author avails himself of this opportunity to confess his obligations to the publishers of the *American Law Review*, the *Green Bag*, the *Canadian Law Times* and the *Canada Law Journal* for their courteous permission to reprint here several of their articles protected by copyright.

OTTAWA, March 1st, 1906.

CONTENTS.

PART I.

(General Essays.)

PART II.

(Verses and Versions)

PART III.

APICES JURIS.

LORD BRAMWELL once exclaimed with fine indignation: "*Law so dry?—I deny it!*" Whereupon he undertook to refute the slander by referring to a standard law-book, consisting of four volumes, whereof he said: "Three of them, to my mind, are most agreeable reading." It is interesting to reflect, in passing, that the aridity of any volume which would offend Lord Bramwell must needs be prodigious; but the chief value of his observations lies in the fact that they implicitly disclose what he would have explicitly denied, namely, that the ratio of dry to attractive or stimulating reading on the lawyer's shelves is fairly 1 to 3.

Ay! beyond peradventure, there are many desert places in the domain of legal science where the mind yearns for the genial waters, the flowers and fruit of that broad human interest with which most other spheres of intellectual endeavor are abundantly endowed. Hence to the lawyer of catholic taste

the maxim *Apices juris non sunt jura* (which is but another writing of the more familiar *Summum jus, summa injuria*) appeals for exploitation with no ordinary charm. For, after all, is it anything more than a technical rendering of the universal counsel of philosophy to 'avoid extremes'?

With such a theme what delightful vistas of licensed divagation from *la légalité nous tue* unfold themselves at the outset of our inquiry!

Let us agree, then, that our maxim *Apices juris non sunt jura* (which, if it has any meaning at all, is equivalent to saying that *Subtleties of the law—principles carried to the extreme of refinement—are not the law*) is but the lawyer's way of affirming the philosophy of the μηδὲν ἄγαν of the Greeks, the *ne quid nimis* of the Romans, and the *juste milieu* of the French.

Perhaps there is no counsel of philosophy that has so intimate a bearing upon conduct and judgment as the one in question; yet in respect of both it requires constant iteration 'lest we forget!' When it is quoted for our admonition in respect of behaviour how prone

we are to echo the petulant cry of Cressida to Pandarus—

"Why tell you me of moderation?"

How often, too, is it lost sight of in forming our opinions of things. "Opinion," says that fantastical prose-lyrist and genial sage, Sir Thomas Browne, "rides upon the neck of reason; and men are happy, wise, or learned, according as that empress shall set them down in the regist r of regulation. However, weigh not thyself in the scales of thy own opinion, but let the judgment of the judicious be the standard of thy merit. Self-estimation is a flatterer too readily entitling us unto knowledge and abilities, which others solicitously labour after, and doubtfully think they attain."

What is the trite exhortation of the advocate who would have the most potent, grave and reverend seigniors of the Bench eschew niceties of interpretation, fine points, *apices*, in applying the law to his case? Surely this: "Avoid extremes, m' luds!" *Medio tutissimus ibis* was the burden of Phœbus's advice to Phæthon in guiding the chariot of the sun—

"Take this at least, this last advice, my son:
Keep a stiff rein, and move but gently on;
The coursers of themselves will run too fast,
Your art must be to moderate their haste."

Unlike Phæthon, Mr. Pickwick was not externally warned to keep 'the middle course,' nor to exercise the art of moderating the pace of the extraordinary steed that "wouldn't shy if he wos to meet a vagginload of monkeys with their tails burnt off" on the memorable excursion of the Pickwick Club to Dingley Dell. But had he heeded the dissuasive counsels of his native prudence he would never have suffered himself and his faithful friends to be led into a situation of extreme absurdity, and withal of bodily hazard.

The poise and moderation of the Greek character was proverbial; and Plato's axiom *Never too much* affords a ready proof of the justice of the following observation by Lessing in the preface to his *Laokoon*, an observation which we must accept as solely referable to the Hellenic race notwithstanding the generality of its terms: "It is the privilege of the ancients never to do too much or too little." Certes, there were other peoples of old who had

not that abiding charm of temperateness which characterized the Greeks. The very first article of the oldest collection of law in the world—the Code of Hammurabi, discovered at Susa in 1902—points the moral that the Babylonian jurists were not careful to avoid extremes in punishing wrong-doers. "If a man bring an accusation against a man, and charge him with a (capital) crime, but cannot prove it, he, the accuser, shall be put to death." This must have made the business of the slanderer in the dominions of Hammurabi, "who brought about plenty and abundance, who made everything for Nippur and Durilu complete," an exceedingly temerarious one.

And yet so dour a penalty would not seem to transcend the demands of 'poetic justice.' Plautus says:

> "*Homines qui gestant, quique auscultant crimina,*
> *Si meo arbitratu liceat, omnes pendeant,*
> *Gestores linguis, auditores auribus.*"

Whereof the following is ventured as a free translation:

> Two would I hang: The man whose slander foul
> Smirches a brother's fame, and wounds his soul;
> Then him who joyfully the falsehood hears—
> *One* by his tongue, the *other* by his ears.

Some of the English poets, too, look upon slander as a capital offence.(a) Ben Jonson and Sir Walter Scott denounce in almost the same words (oddly enough!) the defamer as

"Cutting honest throats by whispers."

Shakespeare and George Eliot concur in treating the slanderer as a thief and robber, which, it is to be admitted, is not tantamount to charging him with capital felony as the law stands to-day, although it would have been in those bygone days when 'pleasant Willy' was writing himself into immortal fame.

What extremists upon occasion, too, are those who sit in the judgment-seat of the High Court of Letters. How sore a plague of decay would settle upon our libraries, 'parliamentary,' 'ambulatory,' 'Carnegie' and what not, if we were to accept blindly the dictum

(a) It is interesting to note in this connection that Bracton declares that murder may be committed *linguâ vel facto*. But this is an instance of the ecclesiastic getting the better of the lawyer in the mind of this ancient commentator —*sin* being confounded with *crime*. See Lord Coleridge's comment on the passage in *Reg. v. Dudley*, 14 Q. B. D. at p. 282.

of Pope's noble friend, the Duke of Buckingham, as authoritative —

> "Read Homer once, and you can read no more,
> For all books else appear so mean, so poor,
> Verse will seem prose. But still persist to read,
> And Homer will be all the books you need."

Such an intemperate estimate of even so great a content of literature as is found in Homer is indeed a swift and heady flight into the teeth of the old saw *Cave hominem unius libri;* but if His Grace had, with prophetic vision, written this doom with reference to the literary out-put of the present day, possibly we should have had to consider the justice of quoting the aforesaid saw against him.

The avaricious and dishonest Verres, immortalized as an example of official corruption by the glowing rhetoric of Cicero, was also an unreasoning extremist. Before him all the protagonists of Tammany Hall ethics pale their insignificant fires. "There was no silver vessel," says his accuser, "no Corinthian or Delian plate, no jewel or pearl, nothing made of gold or ivory, no statue of marble or brass or ivory, no picture whether painted or embroid-

ered, that he did not seek out, that he did not inspect, that, if he liked it, he did not take away." Punning upon his name, Cicero calls him "the drag-net (*everriculum*) of Sicily." It is his extremely ludicrous and abortive attempt to steal the colossal bronze statue of the most illustrious of the Greek heroes from his temple at Agrigentum that constitutes 'the thirteenth labour of Hercules.' If Archimedes could have furnished him with a sufficient fulcrum(*ποῦ στῶ*) to move it, Verres would have stolen the earth.

A moment ago, I mentioned a literary judgment which was not mindful of the vice of extremes. Here is another. In his *Table-Talk*, Hazlitt observes with much truth and point: "How much time and talents have been wasted in theological controversy, in law, in politics, in verbal criticism, in judicial astrology, and in finding out the art of making gold." But how far he falls from the plane of moderation and the judicial quality of the true critic, when he adds:

"What actual benefit do we reap from the writings of a Laud or a Whitgift, or of Bishop

Bull or Bishop Waterland, or Prideaux' *Connections*, or Beausobre, or Calmet, or St. Augustine, or Puffendorf, or Vattel, or from the more literal, but equally learned and unprofitable, labors of Scaliger, Cardan and Scioppius? How many grains of sense are there in their thousand folio or quarto volumes? What would the world lose if they were committed to the flames to-morrow? Or are they not already 'gone to the vault of all the Capulets'?"

Let us take three of the best known names in this group so airily dismissed as a prey to dumb forgetfulness. Think you, O gentle reader, that the *Confessions* of the great Bishop of Hippo will cease to be read so long as man's heart beats true to its native sympathies? I trow not. And is it not Hazlitt, with his more or less precipitate, though undoubtedly brilliant, *Table-Talk*, that figuratively inhabits 'the vault of all the Capulets' to-day rather than the great publicists Puffendorf and Vattel, whose respective works *De Jure Naturæ et Gentium*, and *Droit des gens, ou principes de la loi naturelle*, are structures in the living body of International Law?

How instantaneously does Carlyle swim into our ken when we contemplate the lack of moderation of many of our great men, even though it be but a spot on the sun of genius. (In Carlyle's case, sad to say parenthetically, the spot is often more responsible for heat than the sun itself.) His 'mostly fools' characterization of his British compatriots was bad enough; but the apex of his intemperate rhetoric is touched in his fling at their legal institutions in the essay from which the following 'Pig propositions' are taken:—

"8. '*Have you Law and Justice in Pigdom?*' Pigs of observation have discerned that there is, or was once supposed to be, a thing called justice. Undeniably at least there is a sentiment in Pig-nature called indignation, revenge etc., which, if one Pig provoke another, comes out in a more or less destructive manner: hence laws are necessary, amazing quantities of laws. For quarrelling is attended with loss of blood, of life, at any rate with frightful effusion of the general stock of Hog's wash, and ruin (temporary ruin) to large sections of the universal Swine's trough: wherefore let

justice be observed, that so quarrelling be avoided."

"9. '*What is justice?*' Your own share of the general Swine's trough, not any portion of my share."

"10. '*But what is my share?*' Ah! there, in fact lies the grand difficulty; upon which Pig sciencc, meditating this long while, can settle absolutely nothing. *My share*—hrumph!—my share is, on the whole, whatever I can contrive to get without being hanged or sent to the hulks."

What ineffable nonsense is this to come from 'a person of talents' erstwhile inhabiting the mountain-peaks of philosophy in Craigenputtock! Are these wild words the oracles of the guide and philosopher of his times, or are they but the 'gibbering in falsetto' of the quondam Teufelsdröckh, wallowing the while in the 'Devil's Dirt' of stark madness with all Bedlam let out?

It must be remembered that Carlyle is here writing of England in thc 'fifties' of the last century, when the country was well entered upon that period of social and political

reform which has caused the publicists of Europe to laud her as the mother of liberty and justice—despite their national prejudices. It was of the England that had placed upon her statute-book Lord John Russell's Reform Bill—one of the greatest achievements of modern democracy; the Municipal Corporations Act of 1835—which may in all appositeness be termed the Magna Charta of local self-government; the Act 3 & 4 Will. IV. c. 73, "for the Abolition of Slavery throughout the British Colonies;" the Catholic Emancipation Act of 1829, and the subsidiary religious relief Acts of 1844 and 1846; Lord Campbell's Libel Act of 1843, ensuring the absolute liberty of the press with a just corollary of responsibility; the Poor Law Amendment Act of 1834, based on the principle that no one in England should perish for the want of care and the necessaries of life, and designed to prevent the poor rates from being exploited for the support of the malingerer and impostor; the Mining Act of 1843, which prohibited the employment of women, and children under ten years of age, in underground labor; as well as the cognate

humanitarian legislation embodied in the Factory Act of 1844, and the Ten Hours Bill of 1847.

A most amazing title, truly, do we find in 'Pigdom' for a community wherein such a quality of 'Law and Justice' as this abounded; and in 'Pigs' do we descry an epithet more than strange to be applied to such men as Lord John Russell and Lord Shaftesbury—for they were responsible for much of this legislation—whose splendid enthusiasm for right and righteousness has not yet ceased to energize the philanthropy of British civilization.

It is the lack of all the restraints of fairness and judgment, as manifest in such a diatribe as the above, that will exclude Carlyle from a place among the crowned heads of the leaders of men in the estimation of posterity—just as surely as it marred the influence of his counsels to the men of his time. No man can teach others to be great who lacks the first element of greatness himself, namely, moderation. Leslie Stephen said of Swift that "he scorned fools too heartily to treat them tenderly and

do justice to the pathetic side of even human folly." But Carlyle scrupled not to scorn openly many who were neither fools nor impostors, but were only unfortunate enough to be in the public eye at the same time with himself. Who can vindicate his characterization of Lord Houghton as "the President of the Heaven and Hell Amalgamation Company;" or his playful (!) description of Tennyson (excogitating his idyls of medieval chivalry) as one "sitting on a dungheap among innumerable dead dogs"? Surely, the literary firmament in which Carlyle described his perturbed orbit must have shuddered at such explosions of 'playfulness.'

Taine was right when he employed such epithets as "violent," "savage", "abandoned to imaginative follies," "entirely without taste, order, or measure," to describe Carlyle's attitude toward a subject which excited his disfavour. He had a truly Gargantuan appetite for invective; and was all the more perfervid when his outbursts were undeserved. Restraint was an unknown quantity with him; and moderation he derided as the counsel of

fools. He found in the writing of history his most abiding fame: and yet his histories live not because they are histories but because they are poems!

And yet let us not be rash in our judgment of Carlyle, he was neither an extremely bad historian nor an exceedingly great poet.

But if this essay on the mischief of extremes is to keep itself *sans reproche* in respect of such mischief it behooves us to remember that our observations are primarily addressed to lawyers, that life is short, and that it is high time for us to remove our theme to a more technical environment and 'make an end on 't.'

The poet Terence (*Heaut.* 4, 5, 48) tells us that "Extreme right is often extreme wrong;" and Cicero (*de Off.* 1, 10, 33) refers to the maxim *Summum jus, summa injuria* as a "trite and proverbial expression." The philosophy of the Roman law concerning the matter is expressed in this wise (*D.* 17, 1, 29, 4): "*Non congruit de apicibus juris disputari*"—it is not becoming to debate legal subtleties. Lord Hobart enunciated the same idea when he

said in *Sheffield* v. *Ratcliffe* (Hob. 343): "*Aucupia verborum sunt judice indigna*—catching at words is unworthy of a judge." And Lord Hobart's view is as robustly true to-day as when it was uttered, notwithstanding Chief Baron Pollock's vaunt that "Judges are philologists of the highest order" (*Exparte Davis*, 5 W.R. 523). Fancy, boasting of skill in *φιλολογία*—which originally meant 'love of talk' and now signifies in English what the Germans understand by *Sprachenkunde*—as a feature of the judicial quality! And if it were, what a dead waste of logomachy the business of our courts long ago would have become! Apologies may be due to the memory of the distinguished Chief Baron for venturing to suggest that his hyperbolism must be interpreted to mean that the judges, as a whole, are fair grammarians; but we will risk displeasing the shade of so polished a gentleman, and so good a scholar, as Pollock was. The observation we have quoted, however, is not the only instance we have of his exploiting the vice of extremes. Serjeant Ballantine tells us that he had an inordinate admiration for his

handsome legs encased in the judicial smalls and silken hose; and we cannot condone his hypercriticism of one of the old law reporters: "Espinasse! Oh, yes, he was that deaf old reporter, was he not, who heard one half of a case and reported the other half?" True, Espinasse hasn't the best reputation in the world for reportorial accuracy, but before he could merit the extreme terms of this condemnation he must needs descend into the nethermost abyss of fatuous uselessness.

Baron Martin, who told one of his friends that Shakespeare was "a very overrated man," and who preferred the *Racing Calendar* to all other repositories of light literature, was another extremist in his way.

It is reassuring to meet with the declaration that "common sense still lingers in Westminster Hall;" but that was uttered by a judge over fifty years ago in rebuking an advocate who was urging an *apex juris* upon the consideration of the court. (*Crosse* v. *Seaman*, 11 C.B. at p. 525.) It was only a dictum, moreover, and, peradventure, one to be lightly regarded by the Bench of our own times.

Lord Mansfield thought that the courts ought always to lean against niceties in matters of variance between the parties to a suit (*Rann* v. *Green*, 2 Cowp. 476); and Wilmot, J. once said: "If once we go upon niceties of construction, we shall not know where to stop. For one nicety is made a foundation for another, and that other for a third; and so on, without end." (*R.* v. *Inhabitants of Caverswall*, Burr. Settl. Cas. at p. 465.)

Lord Kenyon threw the weight of his great authority against the tendency of his time to cramp and confine the law by a system of inflexible rules. In *Peaceable* v. *Read* (1 East 573) he said: "No person is less disposed than I am to accomodate the law to the particular convenience of the case; but I am always glad when I find the strict law and the justice of the case going hand in hand together." Of the same mind was Lord Cottenham, who declared it to be right and proper for his court "to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence to forms and rules established under different

circumstances, to decline to administer justice and to enforce rights for which there is no other remedy." (*Walworth* v. *Holt*, 4 My. & Cr. 635.) And Lord Eldon before him had said: "A general rule, established for the convenient administration of justice, must not be adhered to in cases to which. consistently with practical convenience, it is incapable of application." . . . [The difficulty must be overcome upon this principle] "that it is better to go as far as possible towards justice than to deny it altogether." (*Cockburn* v. *Thompson*, 16 Vesey at pp. 326, 329.)

Many other such expressions of judicial opinion concerning the matter in hand might be presented here, but I shall content myself without more than the following observations by Coleridge, C.J. (a man not given to extremes if Disraeli's tart epigram upon him —"silver-tongued mediocrity"—is in any wise to be accepted) in *Reg.* v. *Labouchere*, 15 Cox C. C. 425: "However much men may honestly endeavor to limit the exercise of their discretion by definite rule, there must always be room for idiosyncrasy; and idiosyncrasy, as

the word expresses, varies with the man. . . . The current of legal decision runs often to a point which is felt to be beyond the bounds of sound and sane control, and there is danger sometimes that the retrocession of the current should become itself extreme."

And thus we conclude that the law is greater than its medium of expression; greater than the rules of the grammarian, or the subtleties of the logomachist. "It is," says Vattel (*Law of Nations*, ii, xvii, 273), "a gross quibble to affix a particular sense to a word, in order to elude the true sense of the entire expression." And he illustrates the mischief he deprecates by reference to the conduct of Mahomet, who justified his promise to a captive to spare his head by ordering him to be cut in two through the middle of the body; and that of Tamerlane, who after having induced the garrison of Sebastia to capitulate under the promise of shedding no blood, fulfilled his pledge by causing all the soldiers to be buried alive. Possibly this manifestation of quibbler's logic by men of the sword will be quoted some day as a countenance for the German

proverb that couples the lawyer and the soldier as *des Teufels Spielkamraden.*

Dante called Aristotle

"*Il maestro di color che sanno;*"

and undoubtedly he was raised to that proud eminence by the poet because of his 'sweet reasonableness;' and, in sooth, no lesser man, of any sphere or calling in life, may hope to attain to his potential measure of wisdom unless he persistently threads the reasonable way that divides the extremes in all things mundane.

It is only these *apices juris* whereof we have spoken here that stand between the average lawyer and a full vision of that heavenly thing which Coke, in an unwonted —nay, his solitary—outburst of poetic fervour, calls "the gladsome light of Jurisprudence."

ON THE VALUE OF LEGAL MAXIMS.

'Tis an old maxim in the schools.
SWIFT:—*Cadenus and Vanessa.*

JURISPRUDENCE, in common with the other sciences, has its catena of first principles which imperatively demand our acceptance. Memories of our school-days counsel us that Plato, recognizing Geometry as the first the sciences, wrote over the entrance to his Academy an embargo upon those ignorant of it (*Μηδεὶς ἀγεωμέτρητος εἰσίτω*); and we know that its present stately structure is reared upon the twelve foundation-stones of Euclid's axioms—which have been accepted as true, not, as Hobbes said, because no one ever took the trouble to refute them, but because the conception of their correctness inheres in our consciousness and renders them independent of proof. Bacon explains his abstention from 'vouching the authorities' for his *Rules and Maxims of the Common Law* by saying in the Preface: "I judged it a matter undue and preposterous to prove rules and maxims." Locke (*a*) tells us that "Maxims are certain

(*a*) Essay on Hum. Undst. IV. 7. 11.

propositions which are self-evident, or to be received as true." In this sense, of course, the words 'axiom' and 'maxim' are synonymous. Blackstone so regards them when he says: "The principles and axioms of law, which are general propositions flowing from abstracted reason and not accommodated to times or men, are wisely deposited in the hearts of the judges to be applied to such facts as come properly ascertained before them."(*a*) But although flowing from 'abstracted reason,' it is necessary, in order for a proposition of law to be received as a maxim, to establish that there has been a general and continuous practice to regard it as such.

In *Doctor and Student* (*b*) it is said: "Many of the customs and maxims of the laws of England be known by the use and the custom of the realm so apparently that it needeth not to have any law written thereof."

Appearing to our eyes, as the maxims generally do, clothed in a Latin dress, we are apt to take it for granted that they are wholly

(*a*) Black. Com. iii. 379
(*b*) Cap. IX.

grafts from the *Corpus Juris* upon the tree of the English Common Law. Aside, however, from the fact that their literary savour is in a large degree medieval, the subjects with which many of them deal are so peculiarly indigenous to the domain of English law (c.g. "*Rex non potest peccare;*" (*a*) "*Nullum tempus currit contra ipsum,*" i.e. *Regem*) (*b*) that as soon as we become conscious of the fact we naturally turn to the history of our own juridical development for the origin of such maxims. Kent, when he says: (*c*) "There are scarcely any maxims in the English law but what were derived from the Romans," is not so safe a guide to the student as Lord Bacon who declares in his *Rules and Maxims of the Common Law* that "some of the rules have a concurrence with the civil Roman law, and some others a diversity and many times an opposition." (*d*)

(*a*) See Allen's Royal Prerogative, p.31. Dr. Hannis Taylor assigns the origin of this maxim to the reign of Henry I. See his Orig. and Growth Eng. Const., vol. I, ii, c. iv.

(*b*) Bracton : "De Leg. et Cons. Angliae," 103a.

(*c*) Commentaries, Pt. V. Lect. 39.

(*d*) Preface, I.

There is apparently no trace of anything answering to the nature of legal maxims in the Roman law earlier than the Institutes of Gaius, and only once in a while in that fragmentary work do we come across propositions which correspond in some measure with the modern notion of maxims in the law. (*a*) Maxims, *eo nomine*, do not appear in the *Corpus Juris;* but some English lawyers have endeavored to find in the term 'regula' as employed by Justinian's codifiers a synonym for the 'maxima' of our Common Law. The *Regula Catoniana* is often referred to as an instance of the parallel—Cels.: "Catoniana regula sic definit: quod si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocunque decesserit, non valere; quae definitio in quibusdam falsa est." (*b*) Apart from other points of dissimilarity, none of our modern maxims embody such a commentary upon their occasional inutility as that contained in the last clause of the Catonian rule. It may

(*a*) Cf. Inst. 1, sec. 53, secs. 76-82 and sec. 158.
(*b*) Dig. 34, 7, 1. See also Salkowski's Roman Private Law, p. 918; Moyle's Imperatoris Justiniani Institutiones, 2d ed., p. 304.

be said by the way, that this 'regula' is also called in the *Digest* 'sententia.' (*a*)

In the following passage Fortescue (*b*) asserts an identity of meaning between 'regula' and 'maxima': "Principia autem quae commentator dicit esse causas efficientes sunt quaedam universalia quae in legibus Angliae docti similites et mathematici maximas vocant, rhetorici paradoxas, et civilistae regulas juris denominant." Sir Edward Coke practically reaches the same conclusion as Fortescue when he identifies 'principle' with 'maxime,' and says that "it is all one with a rule, a common ground, postulatum or an axiome, and it were too much curiositie to make nice distinctions between them." (*c*) So whether or not 'regula' is interchangeable with 'sententia' in the *Corpus Juris* is of little importance in tracing the origin of maxims in English law, because Coke's definition is wide enough to cover both.

Again, the Canon Law is the parent of

(*a*) See Dig. 35, 1, 86.
(*b*) De Laudibus, etc., c. 8.
(*c*) Co. Litt. 11a; and cf. 343a.

many of our modern maxims. (*a*) Speaking in this connection, Messrs. Pollock and Maitland observe that "the Decretals of Pope Boniface VIII end with a bouquet of these sonorous proverbs." (*b*) But interesting as the subject is, space does not permit a discussion of its history at any length. To those wishing to pursue it further, however, recourse to Title XVII of Book 50 of the *Digest* (*c*) will prove instructive. Reference for a similar purpose might also be had to the early English treatises on the subject,—those of Bacon, Noy, Jenkins, (*d*) Wingate and Lofft (*e*) and the more modern works of Broom, Lord Trayner, Cotterell and Wharton.

In exploring the domain of legal maxims one cannot fail to be struck with the great

(*a*) See Decretals, V., 41; VI, 12, 5 (De [Diversis] Regulis Juris), and II, 23 (De Praesumptionibus).

(*b*) Hist. Eng. Law, Vol. 1, p. 196 (1st ed.).

(*c*) "De [Diversis] Regulis Juris Antiqui."

(*d*) "Eight Centuries," etc.

(*e*) Bound up with Lofft's "Reports of Cases adjudged in the King's Bench, Common Pleas, and Chancery," the reader will find a collection of maxims all of which the learned reporter would fain have us believe are properly of the substance of English law. If the reader departs therefrom sceptical of the authority of many of the alleged maxims, he will at least have formed a good opinion of Lofft's 'curious learning.'

diversity of opinion that exists in the minds of judges and jurists as to their utility and convenience. On the one side he hears a perfect symphony of praise; on the other a most strenuous chorus of disapproval. We have seen the appreciation accorded them by Blackstone (*a*). The author of *Doctor and Student* (*b*) describes them as one of the sources of English law, and quaintly adds: "The which have been always taken for law in this realm, so that it is not lawful for any one that is learned to deny them; for every one of those maxims is sufficient authority to himself." Bacon says that they are general dictates of reason running through the law, and constituting its ballast. (*c*) Coke pithily says: (*d*) "they ought to be approved because they cannot be proved." Duval (*e*) says much the same thing: "C'est que les maximes, éternel reflet d'une nature de rapports qu' aucune variation ne peut déranger ni at-

(*a*) *Ante*, p. 23.
(*b*) I, cap. viii.
(*c*) Advancement of Learning, Bk. viii. c. iii. Ap. 79-85.
(*d*) 3 Rep. 40a.
(*e*) Le Droit dans ses Maximes, p. 15.

teindre, ou expression d'une suprême nécessité, c'est que les maximes proprement dites, portent leurs preuves avec elles-mêmes."

Cockburn, C.J., in *Reg.* v. *Sleep*, (*a*) said that the maxim *Actus non facit reum, nisi mens sit rea*, is the foundation of all criminal justice. (*b*) Dr. Broom, author of the well-known *Selection of Legal Maxims*, says: (*c*) "In the legal science, perhaps more frequently than in any other, reference must be made to first principles. Indeed, a very limited acquaintance with the earlier reports will show the importance which was attached to the acknowledged maxims of the law, in periods when civilization and refinement had made comparatively little progress. In the ruder ages, without doubt, the great majority of questions respecting the rights, remedies and liabilities of private individuals were determined by an immediate reference to such maxims, many of which obtained in the Roman law, and are so

(*a*) 8 Cox C. C. at p. 477.

(*b*) But see Mr. Justice Stephen's opinion as to the inutility of this maxim in Reg. *v* Tolson, L. R. 23 Q. B. D. at pp. 185, 186.

(*c*) Preface.

manifestly founded in reason, public convenience, and necessity, as to find a place in the code of every civilized nation." Bruns holds that the law itself is nothing but an embodiment of the objective maxims of right: "Die von der höchsten Staatsgewalt aufgestellten objectiven Rechtssätze."(*a*) But although Bruns' opinion has the support of Grotius, (*b*) it may be said that such a view does not conform to Justinian's plan of framing the rules from the law, and not the law from the rules. (*c*)

So much for opinions in praise of maxims: Now let us hear the other side.

"It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and qualifications to them are more important than the so-called

(*a*) Apud Holzendorff, *Encyclopädie* I. p. 258.

(*b*) Grotius (*De Jure B. et P.* i, 1, 9) defines law as "regula actuum moralium obligans ad id quod rectum est."

(*c*) See Dig. 50, 17, 1.

rules." (*a*) Yet it should be mentioned, by the way, that the same learned jurist in an earlier portion of the work here quoted (*b*) says that a judge who wilfully refused to act upon recognized legal maxims would be liable to impeachment. Mr. Floyd Clarke in his admirable book on the *Science of Law and Law-making*, (*c*) observes that the majority of European jurists regard it as a mistake to insert maxims and definitions in a code; and he quotes M. Huc, of Toulouse, as denouncing even the mere rules of interpretation in the French code as "senseless rules, which are useless when they are not dangerous." Austin (*d*) however, thought that wherein the French code omitted definitions it was defective.

Dealing with the well-known maxim, *Sic utere tuo ut alienum non laedas*, Erle, J., in *Bonomi* v. *Backhouse*, (*e*) says the maxim is mere verbiage. "A party may damage the property of another where the law permits; and

(*a*) Sir J. F. Stephen: History of the Criminal Law Vol. 2. p. 94. note 1.
(*b*) Vol. I, p. 2
(*c*) P. 297.
(*d*) Province of Jurisprudence, vol. ii., p. 669.
(*e*) El. Bl. & El. at p. 643.

he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and when it is, the maxim is superfluous." This learned judge says much the same thing in a later case, *Brand* v. *Hammersmith and City Railway Co.* (*a*)

"Much the greater part of the work of the courts," says Professor Terry, (*b*) "has been done by taking what were really extra-legal principles of justice or policy proper for the consideration of the legislature, treating them as rules of law, and then, under the pretense—not always consciously false—of interpreting them and applying them to particular cases, making new rules of law based upon them. . . . If we . . . take up any collection of legal maxims, we shall find that many, perhaps most, express principles of legislation rather than law."

Lastly, let us hear the opinion of Lord Esher on the subject in hand: "Personally, I detest any attempt to bring the law into

(*a*) L. R. 2 Q. B. at p. 247.

(*b*) Leading Principles of Anglo-American Law, secs. 10, 11.

maxims. Maxims are invariably wrong, that is, they are so general and large that they always include something which is not intended to be included."(a)

Amidst all this disagreement of the doctors who shall decide the vexed question of the value of legal maxims? It is trite, but nevertheless wise, to say that the true philosophy of the matter lies in the mean between the two extremes. The lawyer who will turn legal maxims neck and crop out of doors is the man who, unwittingly, avouches the wisdom of one of the least sapient—when taken literally—of the entire collection, *i.e.*, *Omnis definitio in jure periculosa est.* He is so fearful lest the rock of definite statement will not bear his weight that he does not mount it, but flounders miserably in the sea of uncertainty. He cannot realize that 'reason is the life of the law' because he has never learned to reason. "In every process of reasoning there must be, at the commencement of it, something to be proved; there must also be some things, either known or taken for granted as such, with

(a) *Yarmouth* v. *France*, L. J. 57 Q. B. 9.

which the comparison of the propositions begins. . . . Definitions, therefore, are the facts assumed, the first principles in demonstrative reasoning, from which, by means of the subsequent steps, the conclusion is derived." (*a*)

And listen to the view of Savigny:—"In our science all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics." (*b*)

On the other hand, the lawyer who finds a rule or principle more or less applicable to his case, and (possibly for no better reason than that it is hoary with age and couched in bad Latin, or worse law-French) proceeds to wor-

(*a*) Upham's Mental Philosophy, I., Pt. II., sec. 186.
(*b*) Vom Beruf, etc., c. 4, p. 30.

ship it as a Hottentot does his fetish, and declines to recognize the limitations inherent in every attempt at generalization, or the modifications which the evolution of legal science necessarily impose upon it, deserves all the fervid reproof that will surely be his when he goes into court.

So far, of course, as our maxims embody fundamental conceptions of justice and are of the essence of English law they are valid, and require to be reckoned with, for all time. But the wit of the jurist has occasionally devised axioms suitable only to his own epoch of legal development, and, consequently, bound to become obsolete. The line of growth of our system of jurisprudence is strewn with the relics of outworn rules, the exhuming of which is only of interest to the historian and archæologist. Again, some of the old maxims have been frequently misinterpreted, and some that are found in the books have been demonstrated to be entirely false and misleading. Even those whose usefulness has survived to our own day require judicious treatment in their practical application. While they cannot be ig-

nored, their utility cannot be stretched beyond its proper boundary. They are first prineiples only, and not abridgments of the law. The praetitioner who diseovers a 'wise saw' pertinent to his case has only found a good anchor whereby his brief may be moored. Unless he can fill its sails with the prospering gale of 'modern instances' he ean hardly hope to reach the desired haven of success.

ON THE ORIGIN OF CONTRACT.

WHILE Sir Henry Maine's contention that "neither ancient law, nor any other source of evidence, discloses to us Society entirely destitute of the conception of Contract" (*a*) is probably correct, yet no one may expect to find a measurably complete system of conventions in existence at an earlier stage in social development than the decline of the regal period in Roman history.

Contract arises from the commercial relations necessarily existing between men in civilized Society; and Trade, as we know it, began its history in the above-mentioned epoch (*b*). It is quite true that a system of barter of commodities is to be found at the very dawn of social life. For instance, we learn in the *Iliad* (*c*) that "the long-haired Greeks bought, from the Lemnian ships, wine

(*a*) Maine's Ancient Law, p. 312. The oldest embodiment of positive law, the Code of Hammurabi (circa 2250 B.C.), discovered at Susa recently, shows that the Babylonians at that time had made remarkable strides towards an organized law of Contract.

(*b*) "Trade is throughout the result of an express or implied contract." Hare on Contracts, cap. I, p. II.

(*c*) Bk. vii. 472.

—some for bronze, some for gleaming iron, some with hides, some with living kine, and some with captives." And in the *Odyssey* (*a*) we meet with the very suggestive phrase—

πρίατο κτεάτεσσιν ἑοῖσιν.

But as Paul points out in Bk. xviii., Tit. I, of the *Digest*, although these transactions were relied on by a certain school of Roman jurists as indicating that there was a complete system of contracts of sale in use at so early a period in history as the date of the Homeric poems, the passages quoted disclose simple transactions of barter and nothing more. Even at the most flourishing period of their national existence the ancient Greeks shewed a fatal inaptitude for business methods. Their curious, not to say stupid, failure to apprehend the true function of 'money' was alone sufficient to prevent them from becoming a commercial people. Profit derivable from the use of money was prohibited by law, and even so enlightened a thinker as Aristotle could confound 'interest' with 'usury' (τόκος),

(*a*) Bk. i. 430.

and denounce it as unjust (*a*). Indeed, the whole social atmosphere of ancient Hellas was inimical to the development of systematized commerce. The Greek States were constantly at strife between themselves; their peoples despised foreign traders; they attempted to prohibit both exports and imports of certain staple commodities; above all, they were known to the outside world as a dishonest race, who would not scruple to repudiate their obligations (*b*). Hence we must turn from the annals of Hellenic civilization to those of the Roman in order to discover the foundations of the modern law of Contract.

Although at a very early period in Roman history commerce is seen to follow upon the footsteps of military conquest, yet, as has been before pointed out, we must not expect to discover any normalization of mercantile transactions until Rome came to be recognized as the commercial centre of the world. Dr. Muirhead, in his work on Roman Law, says:

(*a*) See his Politics, i.

(*b*) Cf. Cicero : Pro Caecina; also Mahaffy's Social Life in Greece, cap. xii.

"To speak of a law of obligations in connection with the regal period, in the sense in which the words were understood in the later jurisprudence, would be a misapplication of language. It would be going too far to say, as is sometimes done, that before the time of Servius, Rome had no law of Contract; for men must have bought and sold, or at least bartered, from earliest times—must have rented houses, hired labour, made loans, carried goods, and have been parties to a variety of other transactions inevitable amongst a people engaged to any extent in pastoral, agricultural, or trading pursuits. It is true that a patrician family with a good establishment of clients and slaves had within itself ample machinery for supplying its ordinary wants, and was thus to some extent independent of outside aid; but there were not many such families, and the plebeian farmers and the artizans of the guilds were in no such fortunate position. There must, therefore, have been contracts and a law of Contract; but the latter was very imperfect." (*a*).

(*a*) Sec. 12, p. 49.

Now, the basis and vital principle of pure Contract in its origin was, of course, the 'Conventio,' or agreement of the parties, in respect of the subject-matter of the transaction between them; but in the early Roman law it was impossible to obtain the aid of the civil tribunals to enforce an agreement unless it was embodied in some precise form, or was accompanied by some ceremonial act of the parties before witnesses. Passing over the more or less indeterminate archetypes of Contract, 'Jusjurandum' and 'Sponsio,' we arrive at an important stage in the process of development when 'Nexum' appears—and 'Nexum' is a province of Roman jurisprudence which may properly be said to be the Armageddon of the critics (*a*). In this form of transaction, which was primarily one of loan, when the parties were *ad idem* in respect of the subject-matter of their negoti-

(*a*) Anyone desirous of studying the controversy surrounding the subject, may refer to Bechmann, Der Kauf, I., p. 130; Mommsen, Hist. Rome, I., ii., p. 162n; Bekker, Aktionen des röm. Privat. I., 22ff; Huschke, Das Nexum, p. 16ff; Clark, Early Roman Law, sec. 22; Buckler, Orig. and His. Contr. in Rom. Law, pp. 22-31.

ations the ceremonial operation necessary to be superimposed upon their agreement, to make it capable of legal enforcement, proceeded in this wise: The raw copper, which stood for the money that was being advanced, was first weighed in a pair of scales by an official 'libripens' (*a*); then a single piece of it was weighed in the presence of five witnesses, and delivered by the lender to the borrower as a symbolic delivery of the whole; thereafter (according to Huschke (*b*) and Giraud (*c*), whose formula Dr. Muirhead (*d*) considers might not be wide of the mark, although history has not preserved the precise words) the lender, the sole speaker in the transaction,

---

(*a*) Mr. Buckler (op. cit., p. 52) controverts the view that the libripens was a public official. He bases his opinion upon the following clause of the XII Tables: "Qui se sierit testarier libripensue fuerit ni testimonium fatiatur improbus intestabilisque esto." There is, however, strong authority for the view that the libripens was an officer of the State. Cf. Kelke's Rom. Law, p. 61.

(*b*) Ueber das Recht des Nexum, p. 50.

(*c*) Des Nexi, ou de la condition des débiteurs chez les Romains, p. 67.

(*d*) Roman Law, sec. 31, p. 153. Cf. Salkowski, Roman Private Law, bk. iii., p. 553, et seq.

addressed the borrower as follows: "*Quod ego tibi mille libras hoc aere aeneaque libra nexas dedi, eas tu mihi post annum jure nexi dare damnas esto.*" The effect of this formula was to establish what has been indifferently called the 'nexum,' 'obligatio,' or 'vinculum juris' between the parties. The ceremony closed with an appeal to the witnesses for their testimony to the consummation of the contract. It should, perhaps, be mentioned here that after the introduction of coinage the etiquette of the scales was so far modified that they were simply touched with a single 'as,' representing the money transferred by the contract of loan—hence the transaction was designated 'per aes et libram.'

The remedy for breach of the contract on the part of the debtor ('nexus'), at least before the Code of the XII Tables, extended to the loss of his personal freedom, and his reduction to the status of a slave of his creditor. The release ('nexi solutio') of the obligation could only be effected by a ceremony similar to that attending its creation; the amount of the loan being weighed by the 'libripens' and

solemnly returned to the creditor by the debtor in the presence of witnesses (*a*).

It is true Sir Henry Maine's view (*b*) that Contract was but an extension of the ancient 'Conveyance,' and that the 'Nexum,' with its similar ceremony of the scales and witnesses, was, therefore, the earliest form of Contract to be found in the Roman law, has been keenly disputed by Dr. Hunter (*c*). The latter holds the opinion that the 'Stipulatio' (a survival of the primordial 'Sponsio') at least synchronizes with the contractual 'Nexum' in its origin, if, indeed, it is not older. Bearing in mind, however, that the 'Sponsio,' with its religious sanction for enforcing the agreement of the parties, was not peculiar to the Roman people, but was known to other Aryan communities (*d*), and that with the advent of the 'Nexum' appears the first evidence of a secular sanction, there is, it seems

---

(*a*) Cf. Gaius, iii. 174, 175; Buckler's Origin and Hist. Contract in Rom. Law, p. 31; and Hunter's Rom. Law, 3rd ed., p. 459.

(*b*) Ancient Law, 14th ed., pp. 319-322.

(*c*) Hunter's Rom. Law, 3rd ed., pp. 525, 536-540.

(*d*) Cf. Buckler's Orig. and Hist. Contract in Rom. Law. p. 22.

to me, very strong reason for treating it as the earliest form of Contract indigenous to the Roman system of law.

The oppressive sanction of the 'Nexum' was bound to give way before the growing humanitarianism of civilization. By the *Lex Poetilia* (A.U.C. 428), it was enacted that no one should thenceforth be enslaved for borrowed money, and that all insolvent debtors then in bondage should be liberated by their oath that they had faithfully endeavored to pay their creditors. Thus, it may be said, by the way, that Roman legislation for the relief of insolvent debtors began at a very early stage in national development as compared with that of England.

In addition to its semi-barbarous features, the cumbrous machinery of the 'Nexum' was unsuited to the needs of commercial activity; and so we are not surprised to find that before the time of Justinian nexal contracts had become obsolete, the simpler form of the 'Stipulatio' being used in their stead. Mr. Buckler (*a*) inclines to the view that about

(*a*) Origin and Hist. of Contract in Rom. Law, p. 98. Cf. Muirhead's Rom. Law, pp. 228-9.

the time of the creation of the office of Prætor Peregrinus, the 'Stipulatio,' stripped of the religious character appertaining to it under its old name of 'Sponsio,' and extended to contracts between Romans and aliens, came into general commercial use.

The form of 'Stipulatio' in the later Roman jurisprudence, although simple, was peculiar, and the law exacted full conformity with it in all cases. The contract was effected by the utterance of what are called 'formal words of style,' consisting of an interrogation by the promisee and a categorical answer by the promissor, *e.g.*, "*Quinque aureos mihi dare spondes?*"—"*Spondeo;*" "*Promittis?*"—"*Promitto;*" "*Dabis?*"—"*Dabo;*" "*Facies?*"—"*Faciam.*" (*a*).

The 'Stipulatio,' although it came to be applied to many transactions which we have no space to mention in detail here, never lost its ceremonial character. A promise given without being a formal answer to an inquiry

(*a*) See Lord Mackenzie's Roman Law, 6th ed., p. 228; and Gaius, iii., secs. 92-93. Cf. Bracton's application of this formula to his 'Donatio,' in bk. ii. of his De Legibus, etc. Angliae, cap. v.

from the promisee was *nudum pactum;* but where the 'formal words of style' were employed, the transaction became an act in the law and gave rise to an obligation.

This was the origin of the 'Formal' contract in the law of Rome, which prepared the way for (a) the 'Literal,' (b) the 'Real,' and (c) the 'Consensual' species in regular order of historical development. Taken together, they constitute beyond all doubt Rome's greatest contribution to the jurisprudence of modern civilization.

ON CONTRACT IN THE COMMON LAW.

THE deeper one goes into the literature of the subject the stronger becomes the conviction that nowhere does the philosophy of the early Common Law show itself so tenuous as in the province of Contract. Doubtless it was the recognition of this fact that impelled such writers as Sir Frederick Pollock and Sir William Anson to attempt to ingraft the consensual theory of the Continental jurists upon the English system, and to argue that in the Common Law as well as in the Civil Law the original conception of contractual obligation was derived wholly from Agreement—*Consensu fiunt obligationes* (*a*) That the English system of Contract has been developed along this line has no support in history; and, strange as it may seem, the Common Law evolved no general conception of contractual obligation until comparatively recent times.

Reference to the ancient books discloses a singular poverty of ideas in respect of this

(*a*) See Gaius, Dig. xliv, 7, secs. 1-2.

great branch of jurisprudence. Bracton (*a*), finding the native law *tabula vacua* in this province, was bold enough to borrow somewhat from Azo, as well as from the *Institutes*, and to set down his pilfered matter as the indigenous product of English soil. The conspicuous lack of success which Bracton experienced in this venture is admitted by Professor Maitland, who may be regarded generally as an apologist for the medieval writer (*b*), and Professor Salmond, in a monograph entitled "The History of Contract" (*c*), speaks of it as follows: "In Bracton and Fleta, indeed, we find an attempt to employ the general principles of the Roman Law as a setting for English contracts, but the chief significance of this attempt lies in its failure. Perhaps in no other part of the law have Roman principles been so prominently introduced only to be so completely rejected."

(*a*) De Leg. Angl. 99, 100. Both Britton and Fleta take their cue from Bracton in respect of furtive enterprises upon the Civil Law.

(*b*) See Publications of Selden Society, vol. 8 (Bracton and Azo, Intr. pp. xiv-xix). Also Pollock & Maitland's History Eng. Law (2nd ed.) vol. ii, p. 194.

(*c*) 3 Law Quart. Review, p. 166.

It is quite true that the 'lex mereatoria' was recognized in England at a very early date, and in that body of law the prineiples of Contraet had been advaneed to a very remarkable degree of order even before the elose of the thirteenth eentury. But, as Professor Maitland points out (*a*), the 'lex mereatoria' was simply a eode of private international law. By the eharter (*Carta Mercatoria*) granted by Edward I to the foreign merehants trading in the kingdom, it was provided that "Every eontraet between the said merehants and any persons wheneesoever they may eome, toueching any kind of merehandize, shall be firm and stable, so that neither of the said merehants shall be able to retraet or resile from the said eontraet when onee the 'God's penny' (*b*) shall have been given and reeeived between the

(*a*) Publ. Selden Soc., vol. ii (The Fair of St. Ives), p. 133. See also Black. Com. i, 273.

(*b*) It may be explained here that the 'God's penny' (denarius Dei) was originally a tribute levied by the Church upon the business transactions of the faithful, and constituted a medium whereby such transactions received a religious sanction. The denarius Dei must not be confounded with the 'arrha' of the Roman law, because it was not regarded as 'part payment' but simply as a symbol of the conclusion of the bargain between the parties. There is some doubt as to whether

parties to the contract'' (*a*). But this provision of the Edwardian contribution to the 'lex mercatoria' was in direct opposition to the rule of the Common Law, which expressly denied to the transfer of the 'God's penny' the effect of confirming the contract, or, in the language of a later stage of legal development, constituting an 'earnest to bind the bargain'.

A careful examination of the sources of our juridical history will justify the conclusion that the English law of Contract was, in its inception, merely an escape from the fertile garden of Procedure. Indeed, it may be said generally that the moulders of the Common Law only saw 'Rights' through the refracting medium of 'Remedies.'

In early times the King's Court provided no means for the general enforcement of con-

---

the English doctrine of 'earnest' is derived from the denarius Dei. Fry, L.J., in *Howe* v. *Smith* (27 Ch. D. at p. 102) adheres to the former derivation, and it certainly has strong etymological support (arrha, erles, ernes). Pollock & Maitland, however, in their learned 'History of English Law' (2nd ed. vol. ii, p. 209) express the view that the origin of this doctrine is to be traced to the provision concerning the denarius Dei in the Carta Mercatoria, quoted in the text.

(*a*) See Smith's Mercantile Law, 10 ed. Introd. lxxiv.

ventional obligations. The writs by which actions of any kind might have been instituted were few in number, and the rules of pleading so technical and inelastic as to exclude the generalizations necessary to the existence of any body of substantive law. At the close of the thirteenth century, not only in matters savouring of contract but also in the province of civil wrongs, the remedies to be had in the King's Court were so restricted and inadequate that the maxim, *Ubi jus, ibi remedium*—the proud boast of the Common Law in a later era—could only have been quoted in derision. But public opinion at length demanded a reformation of this state of things, and in the year 1285 the Statute of Westminster II. (13 Edw. I, c. 24) (*a*) enacted that "whensoever from henceforth a writ shall be found in the Chancery, and in a like case, falling

(*a*) Some writers would have us believe that this statute was passed not with a view to increasing Common Law remedies (which, they say, were always commensurate with Common Law rights) but simply to quicken the diligence of the Clerks in the Chancery, who were too much attached to precedents (See Broom's Legal Maxims, 7th ed., p. 151). But the above-quoted words of the statute do not lead to that conclusion; and it is undeniable that he who made the writ, made the law, in that period of our legal history.

under the same right and requiring like remedy, no precedent of a writ can be produced, the Clerks in Chancery shall agree in forming a new one; and if they cannot agree, it shall be adjourned till the next parliament, when a writ shall be framed by the consent of the learned in law, lest it happen for the future that the Court of our Lord the King be deficient in doing justice to the suitors.'' It was this statute which, leading as it eventually did to the introduction of actions of Trespass upon the Case, laid the foundations of the modern English law of Contract (*a*).

The most ancient remedy in the King's Court that we have to consider is the action of Debt. Looking solely to the meaning of the word 'debt' in present legal use, one would be persuaded that the origin of the remedy must necessarily have been postponed to the development of some definite conception of contractual obligation. Such, however, is not the case.

In its origin the Writ of Debt was not based upon any idea of Contract, but sought

(*a*) See infra.

to enforce a *duty* against the defendant. It contemplated a duty on his part of which the plaintiff had a right to exact fulfilment (*a*). In other words the theory of the action was *droitural* rather than contractual. Recourse to the text of Glanvill will illustrate the correctness of this view. "Pleas concerning the debts of the Laity also belong to the King's Crown and Dignity. When, therefore, any one complains to the Court concerning a Debt that is due to him, and he is desirous of drawing the suit to the King's Court, he shall have the following Writ for making the first summons: '*The King to the Sheriff, Health.* Command N. that, justly and without delay, he render to R. one hundred marks which he owes him, as he says, and of which he claims that he has unjustly deforced him. And unless he does so, summon him", &c. (*b*).

Clearly, upon the face of the writ, this remedy contemplates the restoration of property wrongfully withheld rather than the

(*a*) Cf. Holmes, Common Law, p. 264; Pollock & Maitl. Hist. Eng. Law (2nd ed.) vol. ii, p. 212; Ames, 8 Harv. Law Rev., p. 260.

(*b*) Glanvill, Bk. X, cc. 1 and 2.

enforcement of a promise to pay a certain sum of money due. The obligation upon the defendant is to right a wrong, not to perform an undertaking. The word 'deforced' is eloquent of the tortious side of remedies in the Common Law; and later on in history we see damages allowed for the 'detention' of the debt, an element which removes Contract still further from the theory of this action (*a*). 'Debt', as we have seen from the form of the writ given by Glanvill, was originally an action *in rem*. By the time of Edward I. the action was subdivided into: (a) *Debet* and *Detinet*, and (b) *Detinet* only. The writ in the *Detinet* ('Detinue') had become the proper remedy for the recovery of specified chattels belonging to the plaintiff; while 'Debt' lay for the recovery of a specific amount of unascertained chattels (*b*). As the purely 'Detinue' side

(*a*) "The creditor is being 'deforced' of money, just as the demandant who brings a writ of right is being 'deforced' of land. The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods." Poll. & Maitl. Hist. Eng. Law. (2nd ed.) ii, p. 205.

(*b*) Cf. Ames on 'Parol Contracts,' etc., 8 Harv. Law. Rev., p. 260; Terry's 'Leading Principles of Anglo-American Law,' sec. 147.

of this action played no part in the development of the English law of Contract, it needs no further mention here (*a*).

At the time when Glanvill wrote, the plea-rolls show that there were very few actions of Debt. It is true that he enumerates (*b*) a number of *conventiones* in respect of which the writ would lie in the King's Court—such as sale, loan, and hiring of services—but he concludes his enumeration of them as follows: "We briefly pass over the foregoing contracts, arising as they do from the consent of private individuals, because . . . . the King's Court does not usually take cognizance of them; nor, indeed, with such contracts as may be considered in the light of private agreements (*privatae conventiones*) (*c*) does the King's Court intermeddle". Possibly the reason why the King's Court did not 'usually', as Glanvill naïvely puts it, take cognizance of

---

(*a*) Cf. Salmond's Hist. of Contract, 3 Law Quart. Rev. 167.

(*b*) Book X.

(*c*) A 'private agreement,' as Glanvill used the term, meant an agreement made outside the King's Court. See Salmond, 3 Law Quar. Rev. at p. 169.

private conventions inhered in the fact that, at least down to the reign of Edward I., the King's Court was extensively used as a medium for augmenting the royal revenues, and only the rich could afford the luxury of litigation there (*a*). However that might be, the paucity of writs of debt on the plea-rolls is notable in the early stages of the history of Common Law actions: and it is not until the time of Fleta that we find authority in the books to the effect that private agreements are enforceable in the King's Court (*b*). But even this widening of the province of Procedure does not carry us very far in the development of a general theory of Contract, for it was only private agreements in writing under seal (covenants) that the King's Court then condescended to take cognizance of.

A further reference to Glanvill's text discloses that the old action of Debt required the plaintiff to do two things to entitle him to succeed: First, to allege "a just cause inducing a debt" (*justa causa debendi*); and,

(*a*) Cf. Poll. & Maitl. Hist. Eng. Law (2nd ed.) ii, 205.
(*b*) Fleta, iii, 14, 3.

secondly, to furnish sufficient proof of the matter alleged.

I have been careful to point out above that this action did not contemplate an obligation arising upon a promise or agreement, and I wish to repeat here that none of the *causae debendi* mentioned by the early Common Law writers (although we hear much talk of 'Contracts' by Glanvill (*a*) and find an ambitious attempt at a definition of contractual obligation in Britton (*b*)) are matters of simple or parol contract. Let us take, for example, the contract of sale. It was not until the title to the thing sold passed from the seller to the buyer that an action of Debt would lie for the price. So long as the contract remained executory on both sides there was no obligation in the contemplation of the law at that time (*c*). What was necessary to the creation of an obligation (*causa debendi*) in respect of a simple contract, enforceable by the action of Debt, was *part performance of the contract.*

(*a*) See ante, p. 56.
(*b*) Bk. i, 62.
(*c*) Cf. Langdell Contr. (Summ.) ii, p. 1041.

The simple contract did not become a *causa debendi* until the debtor had received some thing from the creditor which stood as an equivalent for the obligation sought to be enforced against him. Hence it is obvious that in such a case the obligation was not derived from a promise but from the receipt of a *quid pro quo* (*a*); and so while it is possible to say that the old action of Debt developed a conception of an element of Contract akin to the modern doctrine of Consideration, it would be quite wrong to say that Debt affords any prototype of the theory of obligation as derived wholly from Agreement (*b*). And we can reach this conclusion without adopting Prof. Langdell's view that the legal mode of

(*a*) Mr. Justice Holmes (Com. Law, pp. 247-288) thinks that the quid pro quo as evolved by the action of Debt was the real parent of the modern doctrine of Consideration; but Prof. Salmond (3 Law Quart. Rev. 178, 179) very strongly argues that the latter was derived wholly from Assumpsit.

(*b*) An illuminating side-light is thrown upon the subject in hand by Holt, C. J., in *Smith* v. *Airey*, 2 Ld. Raym, 1035. He is there reported as saying "winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an indebitatus assumpsit would not lie for it; but the only ground of the action in such cases was the mutual promises. That though there were a promise, yet Debt would not lie upon that." See also *Walker* v. *Walker*, Holt, 328; 5 Mod. 13.

creating a debt is not by contract, but by grant, *i.e.*, by the transfer of a sum of money from the debtor to the creditor without delivering possession (*a*).

Adverting now to the proof of the debt, there were two methods in vogue in the early history of the action. It was incumbent upon the plaintiff to produce a written acknowledgment of the *causa debendi* ('carta'), or a train of witnesses ('secta') to establish his plaint (*b*). Now it is not surprising to find that suitors were not slow to appreciate the advantages of the 'carta' over the 'secta' mode of proof; and it did not require a very long period of time to convert the 'carta' from the mere evidence of a debt into a debt *per se*. Thus we have it stated by Bracton: "Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit, sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se

(*a*) It is fair to say that Prof. Langdell admits that his view does not apply to the creation of every kind of debt. See Langdell Contr. (Summ.), ii, 1040.

(*b*) Cf. Glanvill, Bk. x, cc. iii and xii.

debere et non solum obligatur quis per verba, sed per scripturam, et per literas, non ut literae quidem ipsae vel figura literarum obliget, sed oratio signifieativa quam exprimunt literae, sed utrumque cooperatur ad obligationem, oratio significativa simul cum litera'' (*a*).

In this passage Braeton is honestly expounding the native law of his day, and it will be observed how paramount a part the principle of Estoppel plays in the formal obligation of the Common Law; for he declares that if a person ''shall write that he owes money to another, whether the money has been paid to him or not, he is bound by the writing, nor ean he object that the money has not been paid, in the face of the writing.''

It remains to be said that the neeessity for the 'carta' to be under seal effectually prevented the extension of the remedy under consideration to parol contracts, and destroyed its usefulness toward the building up of any general theory of conventional law. Theneeforward Debt, as a distinetive legal remedy, begins its decline toward obsolescence; and

(*a*) Leg. et Cons. Angl. iii, f. 100b.

perhaps the chief interest that it holds to-day is for the student of comparative jurisprudence, who finds in the method by which it evolved the formal contract of English Law a striking analogy to the development of the contract 'literis' in the Roman Law (*a*).

The origin of the Writ of Covenant (*breve de conventione*) is not at all clear from the books. It would be reasonable to think that it was an off-shoot from the action of Debt, coming into use when the sealed writing ('carta') became recognized as a good *causa debendi*; but so far from that being the case we find that this writ was never allowed as a remedy for the recovery of a mere debt, even though the debt was acknowledged by a sealed instrument (*b*). The reason for this discrimination is to be traced (1st) to the recognition of the non-contractual nature of the obligation in Debt; and (2ndly) to the fact that the

(*a*) "The literal contract is, in short, merely an example of the doctrine of Estoppel." Hunter's Rom. Law, 3rd ed., 527.

(*b*) Professor Ames (2 Harv. Law Rev. 56) says that prior to the xviith century he could discover no case where plaintiff succeeded in an action of Covenant brought in respect of a debt.

over-lapping of actions was not favoured in the early history of Procedure. Then we have advocates of the view that, as its name plainly suggests, the action of Covenant was an inheritance from the law of Real Property (*a*). However this may be, it is abundantly clear that although the action as it first appears on the plea-rolls relates wholly to contracts in respect of land—the earliest conventions being leases of land for life or years—attempts were subsequently made to extend the scope of the action to other classes of conventions. Indeed we have a declaration in the Statute of Wales (A.D. 1284) that the list of enforceable conventions at that time was so great that they could not be enumerated. But these efforts at generalization were effectually nipped in the bud by the stringent rule of evidence in the King's Court, formulated about the close of the thirteenth century, which regarded a sealed writing as the only admissible proof of a 'convention' between the parties to the action (*b*). Thus the operation of the formal

(*a*) Cf. Prof. Salmon's Hist. Contr. 3 Law Quart. Rev. 169; Digby's Hist. Law Real Prop., 4th ed., 175.
(*b*) Y.B. 20 & 21 Edw. I. 222.

contract in the action of Covenant did little to advance a general theory of contractual obligation in the Common Law. But this much must be said for it, namely, that it marks the first step in the march of English jural conceptions from the pseudo-contracts, both real and formal, of Debt, to the true contract derived from Agreement as it obtains in the Civil Law.

It is interesting to note in the early history of Procedure how continually the more liberal-minded of the English judges fretted against the restriction of the seal in actions of Covenant, and how many unsuccessful attempts were made to throw open the doors of the remedy to contracts generally. Four centuries after the rule of procedure above referred to had been formulated, and long after the sealed convention had been accorded a distinctive place in substantive law, we find two great judges in the Court of King's Bench (*a*) espousing the heterodox view that a seal was not necessary to give validity to a written promise without consideration; in

(*a*) In *Pillans* v. *Van Mierop*, 3 Burr. at pp. 1669-1671.

other words, that there could be no 'nudum pactum' in writing. As might have been expected, however, this 'quicksand in law' was soon repudiated. In *Rann v. Hughes* (*a*) it was authoritatively laid down that there is no such thing in English law as a mere 'contract in writing.' If the contract is not by specialty (writing, under seal) then it is by parol, and requires a consideration.

The Writ of Account merits a passing notice here from the fact that it was formerly used to enforce claims which, in a later stage of our juridical development, were enforced by actions of Assumpsit. But inasmuch as it was a droitural writ, like Debt, and not based upon Agreement, it did little or nothing to advance a general conception of obligation *ex contractu* in English law (*b*). When the wider and more convenient remedy of Account in Equity came into use it speedily superseded the action as it obtained in the Courts of Common Law (*c*).

(*a*) 7 T.R. at p. 351.

(*b*) See Pollock's 'Contracts in Early English Law,' 6 Harv. Law Rev. 401; Langdell's 'Survey of Eq. Juris.,' 2 Harv. Law Rev. 243.

(*c*) See Story's Eq. Juris., chap. viii, sec. 446.

We have before observed that the Statute of Westminster II, (13 Edw. I, c. 24) by leading to the introduction of actions of Trespass on the Case, laid the foundations of the English law of Contract. Let us now endeavor to substantiate this statement by an examination of the 'bold and subtle devices', as Sir Frederick Pollock styles them (*a*), employed by the lawyers of the fifteenth and sixteenth centuries to circumvent the narrow formalism of the King's Court, and to throw open its doors to those who sought to enforce obligations arising upon agreements in general.

Trespass arising out of injuries by actual force is the earliest action for damages *simpliciter* known to English law; and it is worthy of notice in passing that the word 'trespass' (*transgressio*) (*b*) was employed as the generic term for civil injuries for a long period in our legal history. Bracton says that every felony

(*a*) 'Contracts in Early English Law,' 6 Harv. Law Rev. 402.

(*b*) "Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property." Black. Com. iii. 208.

is a trespass, although the converse would not be true (*a*). Britton makes the same connotation, and on the other hand uses the word 'torts' to denote certain minor criminal offences (*b*). The latter term, however, became *nomen generalissimum* in the substantive law of wrongs after Trespass took a definite and peculiar place in the law of Procedure.

Before the Statute of Westminster II for an injury done to property in possession, or to the person accompanied by actual contact, the proper remedy was the Writ of Trespass *vi et armis, contra pacem.* Now it is obvious that many cases of wrongs would arise lacking the element of violence or force committed by the wrong-doer, and yet in every way as worthy of redress as complaints for which the 'breve de transgressione' would lie. What more natural, then, when the Edwardian statute authorized the framing of new writs analogous to those already in use, that writs of Trespass on the Case should make their

(*a*) De Leg. et Cons. Angl. f. 119b.

(*b*) Cf. Britton, i, 105 with i, 77. The Stat. West. II also uses 'trespass' in its ancient generic sense. See Coke's Inst. ii, 418.

appearance on the plea-rolls? And so careful are the Clerks in Chancery to observe the statutory injunction concerning analogy that while the new writs omit the allegation of 'force and arms' they scrupulously aver that the wrong was done '*contra pacem*'. This last averment, by the way, did much to preserve the original theory of the action; for a trespass in strictness should be redressed by a fine paid to the Crown as well as by a private satisfaction to the person suing for the injury done him (*a*). It was not until 46 Edw. III that '*contra pacem*' came to be dropped from declarations in actions on the Case (*b*).

There are instances of the '*action sur le Case*' in the Year-Books of both Edward I and Edward II, but the evolution of Case for breach, by negligence, of any undertaking (assumpsit), occurred between the twenty-second and forty-second years of the reign of Edward III. In the former year (*c*) we find a plaintiff alleging that the defendant had un-

(*a*) Cf. Stephen's Com. iii, Bk. 5, c. vii.
(*b*) See Reeves Hist. Eng. Law, iii, c. 16.
(*c*) Y.B. Edward III, 22 Ass., pl. 41, fol. 94.

dertaken to ferry plaintiff's horse over the Humber safely, but that he had overladen his boat so that the plaintiff's horse perished "*à tort et à damages*, &c." It was contended for defendant that upon such an undertaking the plaintiff's remedy was in Covenant; but it was decided that the defendant had committed a trespass in overloading his boat, and that Case would lie therefor. It is apparent at a glance that the theory upon which this case was decided was 'tort' although there had been an express undertaking (assumpsit) by the defendant to carry safely the plaintiff's horse.

In another action on the Case in the same reign we find the conception of 'tort' in its generic scope beginning to lay hold of the minds of lawyers. Y.B. 42 Edw. III, 13, discloses a claim brought against an inn-keeper in which the plaintiff declared that he came to the defendant's inn, and left personal belongings in the chamber allotted to him there; and while he was absent from the room they were taken away, through, as plaintiff alleged, the neglect of the defendant and his servants, "*per tort et enconter les peas*", and "to the

damage of the plaintiff, &c." Plaintiff got a writ according to his case, and the action was held good.

The above instances show that efforts at classification were coeval with the enlargement of legal remedies under the Statute of Westminister the Second. As would be expected the medieval lawyers saw the incongruity inhering in the fact that one and the same remedy lay for the enforcement of such divergent rights as those arising out of Wrongs and those dependent upon Agreement; but it is a matter of history that this desire of the pleaders for classification was not accomplished for a century after the statute referred to was passed.

Four years after the adjudication of the case last mentioned the books disclose a case in which counsel for the defendant objected to the form of the action (*a*). The plaintiff brought suit against the defendant, a farrier, for that being employed to shoe the plaintiff's horse "*quare clavum fixit in pede equi sui in certo loco per quod proficuum equi sui per*

(*a*) Y. B. 46 Edw. III, 19 pl.

longum tempus amissit," &e. It was objeeted that while the writ was in trespass, it was not laid '*vi et armis*.' To this objeetion plaintiff answered that his writ was aeeording to his case; and though it was further eonterded that if any trespass was done the writ should aver, '*vi et armis*', or '*malitiosé fixit*', besides '*contra pacem*', the plaintiff's aetion was maintained.

On the other hand, we have a case (*a*) wherein the plaintiff charged that the defendant took two bushels of corn from the plaintiff 'with foree of arms', out of a certain quantity left with the defendant to be ground. Defendant objected that as plaintiff had alleged in his declaration that the defendant 'took toll', he might have had a general writ of '*cepit et asportavit*' his eorn, with foree and arms; and that he was not entitled to a speeial writ on the ease. This objection was sustained by the court. However, a special writ in a similar ease a short time afterwards was held good (*b*).

(*a*) Y.B. 44 Edw. III, 20.
(*b*) Reeves' Hist. Eng. Law iii, c. 16

From all these instances it will be seen that the procedure in Trespass on the Case was in a very immature and unsettled state in the reign of Edward III. It was not until the reign of Henry IV that the line of demarcation between Trespass proper and Trespass on the Case was effectually established. In 12 Hen. IV, 3, in an action for stopping up a sewer, the distinction between the two remedies was drawn as follows: An averment of '*vi et armis*' as to the stopping up of the sewer was good, because it was by force and so properly remediable in Trespass; on the other hand, the consequential damage, which was the gist of the action, was not recoverable in Trespass but required a special writ. The principle was then laid down that the wrong complained of might be forcible, as in the case then before the court, and be declared '*vi et armis*' even in an action upon the Case; although that action is properly grounded upon the consequence of the wrongful act.

The case last cited was based upon malfeasance, and although the gap between that and nonfeasance in respect of a duty is ethically a

narrow one, it was a long time before it was bridged in legal procedure. The lay mind sees little reason why a right arising from the doing of a wrongful act is enforceable, while one arising out of a breach of a promise to do a lawful act is not; but to the lawyer the distinction is wide enough to cut the province of civil remedies in twain. And so, as we have seen it somewhere stated, in the early history of Procedure the defendant was prone to present these troublesome questions to the plaintiff : "You say I am guilty of a trespass, what was my act of force? If I am liable upon a promise, where is your covenant?" But with the evolution of Assumpsit from the action on the Case came the enforcement of simple contracts in the Superior Courts of Common Law.

In the transition period between Case and Assumpsit we find, in 19 Henry VI, 49, pl. 5, the report of an action curiously instructive as to the conservative disinclination of the courts to depart from the delictual theory in respect of remedies generally. Plaintiff declared that the defendant 'undertook' in London to

treat the plaintiff's horse for a certain malady (''*assuma sur luy a curer son cheval d'un certain malad*[illegible]''), and administered his remedies so negligently that the horse died. The defendant pleaded that the 'undertaking' was made at Oxford, and not at London. Plaintiff argued that the plea was bad because the action was brought for the negligence, and not on the undertaking. To this it was answered that defendant was not alleged to be a farrier by profession, and if there was no undertaking he acted gratuitously, and the action could not be maintained. This view was sustained by the court,—one of the judges observing that there was no actionable negligence unless there was a promise to cure. In this view, so far from the promise or undertaking creating a substantive right of action, it is merely an element of the remedy in tort. It is worthy of remark here, however, that in *Coggs* v. *Bernard* (*a*) Powell, J., says that in the instance last cited the action was held to lie upon the undertaking; and that Holt, C. J., expresses the view that in such a case the confidence

(*a*) 1 Sm. Lead. Cas. (10th ed.) at p. 169.

reposed by the plaintiff in the defendant's promise gives rise to a trust, but does not constitute a contract (*a*).

It is apparent, then, that the courts were in nowise departing from their former practice of taking cognizance of promises under seal only, when they adjudged that a recovery might be had for misfeasance in the execution of a parol undertaking. They looked upon negligence in the fulfilment of a trust or duty as the real gist of the action, and not the breach of the undertaking. But the time came, as it was bound to come in the development of English commercial life, when it began to be put forward that the neglect to perform a promise was something that the courts ought to take cognizance of as giving rise to a substantive right to relief, detached from considerations of any remedy in tort.

For a considerable time the judges of the Common Law courts withstood the demand for enlarging the domain of Procedure, and suitors were driven into Chancery to obtain their rights. The Chancellor proving com-

(*a*) Ibid. at p. 181.

plaeent to the suitors, naturally enough the Common Law judges viewed the eonsequent loss of their business and importance with dismay; and so in 14 Hen. VI, 18, we find the Court of King's Bench entertaining an aetion for mere nonfeasance in respect of an undertaking, whieh must be regarded as the laying of the eorner-stone in the edifiee of Assumpsit as a remedy *ex contractu*. Action on the Case was brought upon an undertaking to procure certain releases, whieh defendant had neglected to perform. Plaintiff was met by the old objeetion that the gist of the aetion being the non-performance of an agreement, his remedy was in Covenant. This objection was now for the first time overruled by the eourt, Juyn, C.J. and Paston, J. instaneing the analogous cases of a earpenter or of a surgeon, who if they undertook to perform eertain aets or serviees, and failed to perform them, would be liable on their parol undertaking (Assumpsit) in an action on the Case, and the plaintiff would not be driven to an action of Covenant. This instance is supplemented by an important case in 22 Hen. VI, 44, where it was laid

down that if land were sold, the vendor might have an action of Debt for the money, and the vendee an action on the Case, if he was not infeoffed of the land.

Undoubtedly the last mentioned cases bring us some distance on the road to a general theory of contract in the Common Law; but it needs no great amount of pains to discern that the element of consent up to this stage plays no such paramount part in the development of our system as it did in the Roman Law. For instance, if we contrast one of the consensual contracts of the Roman law, e.g., *locatio conductio*, with its equivalent in the Common Law, letting and hiring, we find that in the former case the contract is obligatory as soon as the parties have agreed on its terms, although nothing may have been paid or done on either side, nor the contract reduced to writing; while, in the latter case, the validity of the contract does not depend upon the meeting of the minds of the parties in a common purpose, but on the 'consideration' passing between them in respect of the subject of their agreement. The difference between the two

systems is fundamental and precise: In the one case the obligation arises simultaneously with the '*aggregatio mentium*'; in the other the obligation does not attach until the passing of the consideration (*a*). As is shown in Pollock & Maitland's "History of English Law" (*b*), the English inherited the doctrine of *quid pro quo* from their German ancestors, whose courts would not uphold gratuitous gifts, or enforce gratuitous promises. Professor Ames (*c*) explains that the word 'contract' is used in a narrow sense throughout the Year Books. In these ancient records of case-law the word is applied only to transactions where the duty arises from the receipt of a *quid pro quo*—the formal or specialty contract being designated a grant, an obligation or a covenant. It is also to be remembered that the Chancellor, so far as the books disclose, never attempted to give relief upon gratuitous parol promises. The rule governing the Chancery

(*a*) See Maine's Ancient Law, 14 ed., p. 333; and the arguments of counsel and opinion of Kent, C. J., in *Thorne* v. *Deas*, 4 Johns, 84.

(*b*) At pp. 213, 214 of vol. ii, 2nd ed.

(*c*) 8 Harv. Law Rev. at p. 253.

in such matters was: "Upon *nudum pactum* there ought to be no more help in Chancery than there is at Common Law" (*a*). Furthermore, it must not be overlooked that the English doctrine of Consideration had its foundation in ethics rather than in the consent of the parties. The Chancellors who first gave relief in respect of the breach of parol contracts were apparently influenced by the simple desire to prevent a man from intentionally misleading another to his detriment, little attention being paid to the specific enforcement of the promise or undertaking(*b*). It is, therefore, obvious that Consideration had its origin in tort—in the deceit of one of the parties to an agreement. Hence arose the modification of Trespass on the Case known as 'Deceit', which originally applied when-

(*a*) Cary, 7; and see Ames' "Parol contracts prior to Assumpsit," 8 Harv. Law Rev. 255. Lord Eldon's enforcement of a trust created without consideration, in *Ex parte Pye*, 18 Ves. 140, is regarded as the first instance in the books of any modification of the rule above stated.

(*b*) This view is adhered to notwithstanding Judge Story's reliance (Eq. Juris. vol. ii, ch. xviii, sec. 716) upon 8th Edw. IV 4 (b) as a recognition of Chancery jurisdiction to decree specific performance even at that early date.

ever the plaintiff had been induced to part with his goods or chattels upon the parol promise of the defendant. Subsequently this particular form of action on the Case was extended to all instances where the plaintiff suffered detriment by acting on the promise of the defendant. In the early part of last century Deceit lost its identity in Procedure, becoming known as a special action of Assumpsit.

The transmutation of the originally tortious remedy of Assumpsit into one peculiar to the enforcement of parol contracts went steadily forward after the decisions we have referred to in the fifteenth century. For a long time, however, it was contended that inasmuch as Assumpsit implied fraud or deceit, it should be confined to cases where the demand was for damages, and not be substituted for Debt, where it would have the effect of preventing the defendant from 'waging his law' (*a*). Now Indebitatus Assumpsit had two advantages over Debt, the first

(*a*) See Gilbert on Debt, p. 423.

being that the defendant could not 'wage his law', and so preclude the plaintiff from submitting his case to the jury ; the second being that the niceties of pleading in Debt were overcome by the plaintiff being allowed to state merely the general nature of his action. But the question was settled once for all by *Slade's Case* (*a*) in the latter part of Queen Elizabeth's reign. That was an action of Assumpsit for the price of standing grain, bought by defendant but for which he refused to pay, with intent, as was alleged, to defraud plaintiff. It was objected that Debt only lay in such a matter, and if the plaintiff had an action on the Case it would take away the defendant's benefit of wager of law. In this case the Common Pleas nd Queen's Bench were at variance, and ' or the honour of the law and for the quiet of the subject, in the appeasing of such diversity of opinions'' the case was twice argued before all the ''Justices of England and Barons of the Exchequer'', (the last time by Sir Edward Coke, for the plaintiff,

(*a*) 4 Rep. 91a and 94b.

and Francis Bacon, for the defendant) and it was ultimately resolved in favour of the plaintiff ; the result being that proof by the plaintiff of a simple contract debt is sufficient to support an action thereon, although there is no express promise by the defendant to pay the same.

Thus was the notion of the 'implied promise' introduced into English Law, and the native theory of Contract, if we may be said to have any theory of Contract as distinct from mere rules of Procedure, advanced far towards its present stage of development.

At the beginning of this paper it was intimated that the attempt to ingraft the consensual theory of the Civil Law upon the English Law of Contract is a mistake, and that no satisfactory parallel can be instituted between the foundations of obligation *ex contractu* in the two systems of law. It is submitted that the cases and authorities above discussed support the correctness of that view. Instead of likeness, rather disparity is to be noted between one theory which treats the obligation as arising wholly upon,

and simultaneously with, the agreement of the parties to a contract, and another which, despite the fact that the minds of the parties may have previously met, postpones the obligation until the passing of 'consideration.'

ON THE ART OF BEING IRRELEVANT.

Aloof from the entire point.—KING LEAR, Act 1, sc. 1

RELEVANCY, the principle of 'sticking to the point', is, indeed, a laudable thing as applied to testimony in the courts. What would be more intolerable to Bench and Bar than that the unlucky wight who is condemned to the witness-box should be accorded liberty of speech? Perish the thought! Discursiveness, on the other hand, is the stock in trade of the advocate, who is paid to talk by the day; whilst to divagate, and incidentally to adjudicate, has been the prerogative of the judges from the time whereof the mind of man runneth not to the contrary. No one who has a fairly intimate acquaintance with the reports of cases from the time of Cicero to our own day will dispute my word in this matter.

"Consistencie's a jewell," says the old Scotch ballad, and that may be one reason why the Gentlemen of the Bar, conforming to

the canons of good taste, fail to display it, or its synonym coherency, in their public business. Again, eternal relevancy of argument is looked upon by some as a virtue of the bore, and so we might fall into a contempt if we request the court to practice this or any other virtue. It requires the boldness of a Plato (*Laws*, iv., 188) to tell the judges that they should observe the virtues; and it may be that if his writings are ever brought to their cognizance they will proceed to discipline him *instanter*.

And yet, after all said and done, the practice of the gentle 'art of being irrelevant' has been responsible for many pretty successes at the Bar, and has laid the foundations of some of the most famous achievements in the literature of the law. "Something more than narrowly dealing with the facts of the case may occasionally be necessary also, in order to secure the 'ear of the Court'," says Harris in his *Hints on Advocacy*; and he proceeds to show by historical instances how the judicial ear may be secured by nothing more occult than a good story, well told, but which, like the "flowers that bloom in the

spring, tra-la," may "have nothing to do with the ease."

A moment ago we mentioned the name of Cicero; and there is no advocate in ancient or modern times who has traversed the whole ambit of irrelevancy with so much credit to himself, and advantage to the student of rhetoric. One might be disposed to grant him every license to

"Survey mankind from China to Peru"

in the great State Trials of Catiline, Milo, and Verres; but he repeatedly allows the pinions of oratory to carry him out of sight of the facts in the four forensic addresses in matters of private law which have been preserved to us: *Pro Quinctio, Pro Roscio Comoedo, Pro Tullio and Pro Caecina*. A commentator on the latter finds this excuse for his persistent aberrance: "As is usual in a bad case, the unessential points are dwelt on at disproportionate length." If we go to these speeches expecting, as we might reasonably do, to find clear propositions or statements of the rules of private law as they obtained in his day we

shall be disappointed in our quest. Of legal exposition there is little or none; but of masterly skill in diverting judicial attention from the weak points of a case, by focussing the lightning of rhetoric upon facts aside from the issues, there are examples aplenty.

The elaboration by Serjeant Buzfuz of the evidentiary value of the 'chops and tomato sauce' document—wholly irrelevant as it was—in the immortal case of *Bardell* v. *Pickwick* has been thought by many to be the acme of forensic artifice; but the special pleading of Cicero in the *Pro Archia* is quite as bold, although on an immeasurably higher plane. To make three parts of panegyric upon the literary genius of the defendant adhere (of course they could not *cohere*) to one part of real matter of defence, is no mean achievement in the art of irrelevancy as applied to legal proceedings; and that is the example of advocacy bequeathed to us in the *Pro Archia*. The defendant, Aulus Licinius Archias was arraigned for a breach of the *Lex Papiria* because, although born an alien, he had claimed the rights of a Roman citizen.

Although he had a fairly good technical defenee. Cicero preferred to rest the burden of his argument upon the ground that his client was an exceedingly fine poet, and, as sueh, useful to sing the praises of Rome, and, incidentally, to immortalize the genius of her greatest orator, Marcus Tullius Cieero. Sueh being the case, he said, the court eould not afford to proclaim Archias an alien.

Then take the ease of Erskine, whom Lord Campbell aeclaims as the greatest forensic orator of any age. Is it not eorreet to say that his rapid rise to distinetion at the Bar was due to a brilliant bit of 'offside play' in his first ease in court? In showing eause against a motion to make absolute a rule nisi for an information for libel, obtained by eertain offieers of the Royal Hospital for Superannuated Seamen at Greenwich against Captain Thomas Baillie, Erskine proeeeded in the eourse of his argument to launeh a withering philippie against Lord Sandwieh, who, although a governor of the charity, was not a party to the proeeedings. Lord Mansfield, who was presiding in the King's Bench on the motion,

cautioned Erskine that the noble lord was not before the court. "I know that he is not formally before the court," rejoined Erskine with great warmth, "but for that very reason I will bring him before the court! He has placed these men in front of the battle, in hopes to escape under their shelter, but I will not join in battle with them: their vices, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with me. I will drag him to light, who is the dark mover behind this scene of iniquity!" Lord Campbell tells us that the young advocate was enabled to persevere in his denunciation by the sympathy of the judges, who ought "to have checked his irregularity;" but it was this brilliant, though quite irrelevant, outburst of rhetoric that established his reputation, and caused the attorneys to flock around him with their briefs as he emerged triumphant from Westminster Hall.

Turning for a moment to the irrelevancies of the Bench, it is not to be gainsaid by students of case-law that quite as many reputations, good or bad, have been made by obiter dicta

as by opinions which hit the issues raised in a particular case straight between the eyes. Our statute-rolls show legislation for the suppression of extra-judicial oaths, but there is nothing to prohibit the uttering of extra-judicial opinions, and, contemplating the restricted avenues for achieving fame open to the judges, I rejoice in the absence of such an embargo.

> Because the target I may miss each time
> Pray do not make my crooked shots a crime;
> No bull's-eye's hit—yet who knows but I may
> Bring down a *rara avis* some fine day?

Now the books do not disclose that there ever were judges in any age, who, like Mr. Winkle, were unable to hit the point under any circumstances; but it is true that the best of them over or under-shoot it upon occasion, and yet expend their ammunition to an extremely useful purpose. By way of illustrating the justness of this observation we refer to the leading case of *Coggs* v. *Bernard*, where Holt, C. J. ('a man above all praise,' in the estimation of Lord Kenyon), upon the narrow issue as to whether one who receives

goods into his possession, upon an undertaking to carry them safely without reward, is liable for their loss through negligence in the process of carriage, took occasion to formulate a general law of Bailments for the jurisprudence of England.

Then there is the dictum of Lord Ellenborough in the case of *Weld* v. *Hornby*, to the effect that every weir built across a non-navigable river so as to impede the passage of fish therein is a public nuisance. In that case it was only necessary to decide whether the defendant had the right to convert a certain ancient brush-weir into a stone structure, built so that fish could not pass through it, yet Lord Ellenborough's dictum has been crystallized into a principle of the Common Law both in England and America (See L.R. 5 C.P. at pp. 694, 695.)

True, we are not able to assert that every extra-judicial opinion found in the books will respond to the test of usefulness; indeed it has come to our ears that some counsel, whose ordinary demeanour is dignified self-restraint itself, have been known to say things contrary

to the aforesaid statute made and provided against extra-judicial oaths in conning some of these unintentional essays in the art of being irrelevant. But I venture to think that whatever may be said as to the inherent worthlessness of many of these opinions, strict justice is not done them if lawyers overlook an extrinsic value which they are bound to have, and which I may be permitted to characterize as *litigiferous*. As the blood of the martyrs was the sced of the Church, so the dicta of the judges have been the leaven of litigation. Lord Kenyon once observed on the Bench: "I cannot but lament that the learned judges, in deciding the cases reported in Burrow, did not confine themselves to the points immediately before them, instead of dropping hints that perhaps have invited litigation." In *Steel* v. *Houghton* (1 H.Bl. 51) it appears that a dictum of Sir Matthew Hale was responsible for the action there brought; and industrious research in the books will bring to light many similar instances.

The gentle Elia in one of his essays said there are "books which are no books" (*biblia*

a-biblia); so, in speaking of our immediate subject of discussion, Willes, C. J., declared that there are many "*dicta nunquam dicta.*" But there is this radical difference between the two critical pronouncements, namely, that the literary critic made his rejection on the principle that certain printed and bound things bearing the semblance of books are intrinsically no books at all, while the judicial critic's theory was that many alleged 'things said' by the judges were never said by them at all, but by the reporters.

And, speaking the while of judges, shall we forget the credit they have done themselves by the splendid irrelevancy of their trial jokes as a whole? It is all very well for Lord Campbell to sneer at judicial *jeux d'esprit* in his "Lives," and have us believe that the Bar only laugh at them because they *have* to—*ex necessitate rei*, so to speak; but as a matter of fact no court jesters of old ever enjoyed such splendid countenance as the Bench of our own day do whenever they consciously exploit the art expressed in the Horatian phrase, *desipere in loco.* Counsel

feel that they can safely applaud when the judges *know* they are talking nonsense.

In the next place, to illustrate my point that the irrelevancies of a legal treatise-writer are not without their value and reward, who doubts that if Blackstone's *Commentaries* had lacked the author's pleasant wanderings from the arid paths of the law into the fields and by-ways of history, political philosophy and ethics, they would never have attained their pre-eminence in the lawyer's library? And yet these very divagations impair the work considered as a repository of dry law. Blackstone took a formal farewell of the Muses, and dedicated himself to the 'jealous Jade,' Themis; but in reality he never forsook his early love. In entering upon his monumental work he might have appropriated to himself these words of Lucretius:

> "Firstly, I seek—upon an arduous theme—
> To loose the mind from superstition's bonds.
> Next, to put clear a question most obscure,
> And touch it all with true poetic grace."

It was upon the lines of Sir William Blackstone's method of law-book making that Sir

William Jones, Judge Story and Chancellor Kent wrote themselves into imperishable fame.

Putting this and that together, then, we are led to the conclusion that sweet are the uses of irrelevancy in the domain of the law. It is only the crabbed logician who fulminates against the practice of the gentle art; and we all know that Logic has now gone out of fashion. If we do not understand what the term *ignoratio elenchi* means, how shall we be in any wise perturbed by having the same flung in our teeth?

ON THE PSYCHOLOGY OF NEGLIGENCE.

Seigneur, tant de prudence entraîne trop de soin:
Je ne sais point prévoir les malheurs de si loin.
RACINE: *Andromaque*, 1, 2.

NEGLIGENCE has been characterized as "one of the most difficult, involved and voluminous topics of the law" (*a*).

The English word 'negligence' is derived from the Latin substantive '*negligentia*,' which primarily means 'want of care,' and is the antonym of '*diligentia*.' But while the correspondence between *negligentia* and its English derivative is exact in ordinary use, there is a technical difference between them as respectively employed in the Roman and English systems of law. In the former system *negligentia* only became an actionable or punishable fault (*culpa*) when it fell within the classification of 'great negligence' —"*magna negligentia culpa est*" (*b*).

(*a*) Campbell's "Science of Law," p. 200.
(*b*) Paul., Dig. 50, 16, 226.

In the language of jurisprudence, therefore, *culpa* and *negligence* are to be regarded as terms of equal meaning.

It has been said that no definition of negligence formulated by any one judge or jurist has proved satisfactory to the framer of another definition (*a*), and the reason is not far to seek; for when we begin to define the law we enter the province of philosophy, and since philosophy emerges from the analysis of empirical conceptions, which, as Kant points out (*b*), can only be *explained* and not *defined*, it is not to be expected that in any branch of the philosophy of the law we can start out with the synthetical exactness of mathematical science. But even Kant concedes that propositions or statements, which are properly speaking not definitions but merely approximations thereto, may be used with advantage in philosophy; and, as the subject in hand demands some attempt at a concise state-

(*a*) Shearman & Redfield on Negligence, 5th ed., vol. 1, § 1.

(*b*) Kritik der reinen Vernunft (Method) § 1. In mathematics, Kant says, definition belongs *ad esse*, in philosophy *ad melius esse*.

ment of the elements of negligence in law, the following is predicated upon the opinions of the judges expressed in the cases collected in the foot note (*a*) :

Negligence, as a cause of action for civil damages, consists in the breach of duty to exercise care, whereby injury naturally and proximately results to some one entitled to a fulfillment of the duty.

Before proceeding to examine the legal doctrine of negligence in its psychical bearings it would not be an uninstructive digression to notice for a moment the sociological principle which underlies it as a whole.

That principle has been designated by Herbert Spencer as the principle of 'equal freedom' (*b*). Mr. Spencer says : "Every

---

(*a*) Per Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; per Willes, J., in *Vaughan* v. *Taff Vale Ry. Co.*, 5 H. & N. 679; per Blackburn, J., in *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L., 93 ; per Byles, J., in *Collis* v. *Selden*, L.R. 3 C.P. 498; per Brett, M.R. in *Heaven* v. *Pender*, L.R. 11 Q.B.D. 503; and in *Lane* v. *Cox*, [1897] 1 Q.B. 415; per Patterson, J., in *Chandler Electric Co.* v. *Fuller*, 21 S.C.R. 337; per Robinson, C.J., in *Dean* v. *McCarthy*, 2 U.C.Q.B. 448; per Young, C.J., in *McDougall* v. *McDonald*, 12 N.S.R. 219; per Mitchell, J., in *Osborne* v. *McMasters*, 40 Minn. 103, S.C. annotated in 12 Am. St. Rep. 698.

(*b*) Social Statics, ed. of 1868, p. 121.

man has freedom to do all that he wills, provided that he infringes not the equal freedom of any other man." If we regard the word 'freedom' so used as equivalent to the word 'right' (*a*), then Mr. Spencer's formula sufficiently expresses the legal conception of man's duty to man in the social state. Cicero declared that the right of the citizen to immunity from harm at the hands of his fellows lies at the very base of positive law—"*Fundamenta justitiæ sunt ut ne cui noceatur*, etc.;" and in generalizing the domain of Wrongs the Roman jurists regarded every unjust infringement of the rights of others as the result of malice or negligence, the presence of either rendering the conduct complained of culpable, *i.e.*, giving rise to the legal duty of reparation (*b*). Thus throughout the literature of jurisprudence we shall find that the principle of altruism—*le droit d'autrui*—is

(*a*) "Legal rights are the effects of civilized society. . . . Freedom. . . . . is the effect of law." Bouvier's Law Dict. (by Rawle) 1. p. 848.

(*b*) Cf. Salkowski, Rom. Priv. Law, p. 514, and Goudsmit's Pandects, § 76.

recognized as the very essence of the conception of responsibility for negligence.

So much for the sociological side of the legal doctrine of negligence, a matter not to be lightly passed over by the student of jurisprudence, for, as pointed out by Mr. Clarke (*a*), law is but a branch of the science of sociology.

Turning now to a consideration of the psychical bearings of negligence in law, it must be admitted that there is a regrettable amount of confusion in the books as to whether the element of *intention* on the part of the wrong-doer has aught or nothing to do with the theory of liability. For instance, some writers, such as Mr. Horace Smith (*b*), assert that negligence is an "unintentional breach of duty"; while, on the other hand, we find so distinguished a jurist as Professor Salmond, of the University of Adelaide, affirming that negligence is "a form of mens rea" (*c*). It is submitted that neither of these obviously divergent views can be accepted—the former

(*a*) Science of Law, and Law-Making, p. 4.
(*b*) Smith on Negligence, 2nd ed., p. 1.
(*c*) Jurisprudence, p. 433.

being inexact and the latter wholly untenable. Let us test them by reason and authority.

Dealing, in the first place, with the view that negligence is "an *unintentional* breach of duty," it is reasonable to argue that there may be an *intentional* breach of some particular duty to exercise care not only not coupled with an intent to cause injury to the person entitled to the fulfilment of the duty, but, on the contrary, accompanied by a desire that no injury will be sustained by him by reason of the breach. Let us illustrate this. Suppose A., the owner of a factory, fails to erect a guard or fence around a portion of the machinery in his factory which he knows to be dangerous to the persons employed by him, but which, if so protected, could be operated with safety. B., an employee, in consequence of the breach of duty by A. to exercise care by erecting such guard or fence, sustains bodily injury. Now, although A. was aware of his duty, and *intended to commit a breach of it*, he never intended that B. should be injured thereby, but, on the contrary, hoped that B. would operate the unprotected machinery without accident. Here A. is un-

doubtedly liable for negligence (*a*), but could it be said that the negligence is founded on an "unintentional breach of duty?" Clearly in such a case the psychical element of intention does not manifest itself in relation to the result of the breach of duty, but is confined wholly to the breach itself, which may or may not be followed by an injurious result; and it is only that *result* which makes the conduct of the wrong-doer a subject of juridical enquiry. It is not within the province of the court to go behind the result and enquire into the mental state of the wrong-doer in bringing it about—hence considerations of intention or non-intention are superfluous and beside the question of liability in cases of negligence. To put it shortly, the legal theory of causation in such cases posits *careless conduct* as the external antecedent of *injury*, the external consequent (*b*).

(*a*) See *George Matthews Co.* v. *Bouchard*, 28 S.C.R. 580.

(*b*) Mr. Bigelow (Torts, 2nd ed., p. 13) very properly draws the distinction between intending an act and intending its consequences in this way: "To speak of an 'intended act' is a pleonasm. An 'act' is necessarily intended, though its consequences may or may not be intended." He refers on this point to Ziehen: Physiological Psychology, 29. (Lond. 1892). On this point see also Markby's Elem. Law, sec. 219. Wharton on Negligence, §§ 14, 15.

But, if it is unscientific and inexact to qualify the breach of duty upon which negligence is founded by the adjective "unintentional," can it be said, in the second place, that negligence is "a form of *mens rea*?" This enquiry cannot be answered without first reviewing the place and meaning of the phrase *mens rea* in the language of the law.

The phrase in question is but a fragment of the maxim *Actus non facit reum nisi mens sit rea*, which may be freely translated so: The act does not constitute a crime unless it is attended with a guilty mind, *i.e.*, *criminal intent*. This maxim has been described as "one of Coke's scraps of Latin" (*a*), but its first appearance in the Common Law is much older than Coke's time. In the "Leges Henrici Primi"(*b*) we have it in this form: *Reum non facit nisi mens rea*, and it undoubtedly filtered its way there through the canonists from its primary source in St. Augustine's *Sermones* (*c*). Dealing with the sin of false swearing, St.

(*a*) See an able article on '*Mens Rea*' in 13 Crim. Law Mag., p. 831.

(*b*) 5, s. 28. See Thorpe's Anc. Laws and Institutes of Eng., 1, 511.

(*c*) No. 180, c. 2.

Augustine says: "The tongue is not guilty unless it speaks with a guilty mind" (*Ream linguam non facit nisi mens rea*). However, in the Leges Henrici we cannot expect to find a very marked cleavage between the ecclesiastical and civil bearings of the maxim, and therefore we must return to Coke to discover its place and significance in the Common Law.

In the third part of Coke's *Institutes* (a treatise upon the pleas of the Crown) we find the axiom in precisely the same words as we have it to-day. At p. 10, chapter 1, entitled "Of High Treason," there is the following passage commenting upon Sir John Oldcastle's insurrection in the reign of Henry VIII.:— "It was specially found that divers of the King's subjects did minister and yield victuals to Sir John Oldcastle, knight, and others, being in open war against the King, and that they were in company with them in open war; but all this was found to be *pro timore mortis, et quod recesserunt, quam cito potuerunt*, and it was adjudged to be no treason because it was for fear of death. *Et actus non facit reum, nisi mens sit rea.*"

Again, in chapter 47, entitled "Of Larceny or Theft at Common Law," we read: "First it must be felonious, *id est, cum animo furandi*, as hath been said. *Actus non facit reum, nisi mens sit rea*" (p. 107).

So it is established that the emergence of the maxim from the writings of the ecclesiastics and canonists into the modern jurisprudence of England was through the door of Coke's *Institutes*. Let us trace its development as a principle of the law of crimes.

In Hale's "Hist. Plac. Cor." (*a*), published first in the year 1736, the doctrine of criminal intent is thus enunciated: "The consent of the will is that which renders human actions either commendable or culpable; as, where there is no law, there is no transgression, so, regularly, where there is no will to commit an offence, there can be no transgression or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences" (*b*).

(*a*) Vol. 1, p. 15.

(*b*) There is an obvious confusion of terms in this passage. The author means by the phrases 'consent of the will' and 'will to commit' simply 'mens rea' or 'guilty intent.'

In 1798, Lord Kenyon (*a*) explicitly adopted the maxim as embodying the criminal law doctrine of complementary 'intent' and 'act'. He says: "It is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime." Cockburn, C.J., in 1861, even more emphatically insulated this maxim from the mass of proverbial philosophy, and destined it to the criminal law. He said: "*Actus non facit reum nisi mens sit rea* is the foundation of all criminal justice" (*b*). Sir James Fitzjames Stephen, recognizing the peculiar part the maxim plays

---

The distinction between 'will' and 'intention' as elements of crime is well made in Harris' Criminal Law, 10th ed., p. 10. Sir James Fitzjames Stephen argues the distinction at length in his Hist. Crim. Law, vol. II, chap. 18. The following passage from p. 100 is a succinct statement of his conception of the elements of a voluntary action: "A voluntary action is a motion or group of motions accompanied or preceded by volition and directed towards some object. Every such action comprises the following elements—knowledge, motive, choice, volition, intention ; and thoughts, feelings, and motions, adapted to execute the intention. *These elements occur in the order in which I have enumerated them.*" See also Terry's Lead. Princ. Anglo-American Law, § 79, where the confusion of 'will' with 'intention' in a modern English work is attributed to a German origin.

(*a*) *Fowler* v. *Padget*, 7 T.R. at p. 514.

(*b*) *Reg.* v. *Sleep*, 8 Cox C.C. at p. 477.

in the criminal law, expounds it as follows: "The truth is that the maxim about '*mens rea*' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. Thus, in reference to murder, the '*mens rea*' is any state of mind which comes within the description of malice aforethought. In reference to theft the '*mens rea*' is an intention to deprive the owner of his property permanently, fraudulently, and without claim of right. In reference to forgery the '*mens rea*' is anything which can be described as an intent to defraud. *Hence the only means of arriving at a full comprehension of the expression 'mens rea' is by a detailed examination of the definitions of particular crimes.*"(*a*)

"*Actus non facit reum nisi mens sit rea*—this maxim of our criminal law." *Broom's Legal Maxims* (*b*).

"The guilty state of mind, the *mens rea* or criminal intention." *Harris' Criminal Law* (*c*).

(*a*) Hist. Crim. Law, vol. ii, c. xviii, p. 95.
(*b*) 7th ed. (1900), p. 249.
(*c*) 10th ed. (1904), p. 11.

"The maxim is exclusively applicable to criminal cases and does not affect civil cases." *Adams' Juridical Glossary* (*a*).

There would seem, then, to be no doubt that the maxim in question has, from the very earliest times down to the present, had a special place and meaning in the criminal law; and, that being so, any unnecessary dislodgment of it therefrom for the purpose of making it do duty as a part of the technics of another and distinct branch of legal science is to be deprecated under any circumstances, but where the new setting for the old maxim is incongruous and subversive of its original meaning, such a use, or rather abuse, ought not to be allowed to become general.

It is submitted that a thorough examination of the psychology of negligence will demonstrate that Professor Salmond's view (*b*)

(*a*) 1st ed. (1886), p. 59.

(*b*) Absolute originality in the impugned use of the phrase 'mens rea' is not to be charged against Professor Salmond. For instance, more than a dozen years before the appearance of Salmond's "Jurisprudence," Cave, J., in *Chisholm* v. *Doulton* (1889) 22 Q.B.D. at p. 741, said :—"It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of

that negligence is "a form of *mens rea*" (*a*) is not only inaccurate, but misleading—

(1) Because the phrase '*mens rea*' in legal technics (*b*) has become a synonym for *criminal intent.*

(2) Because even if the term might with propriety be extended to denote the psychical element of 'intention' in civil wrongs involving fraud or malice, it is meaningless as applied to negligence.

The first branch of this proposition has, I hope, been adequately established; it remains for me to demonstrate the correctness of the second.

If we survey the province of civil wrongs in English law, as a whole, we find that they resolve themselves into three great classifications:

1st. *Personal wrongs*, marked by a delib-

---

mind. Sometimes it is negligence, sometimes it is malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression 'mens rea.' "

(*a*) It should be stated that Professor Salmond, when he expresses the view above quoted, refers to negligence as the foundation of liability in civil cases.

(*b*) "The law has its technical terms, and hence a dictionary of its own." Bigelow on Torts, 2nd ed., p. 15.

erate intention to do harm, such as cases of assault, slander and libel, conspiracy, and malicious prosecution (*a*);

2nd. *Wrongs to property, i.e.*, trespasses to lands, goods and proprietary rights;

3rd. *Wrongs arising to the person, or property*, through negligence (*b*).

The theory of responsibility referable to each of these three groups is distinctive. In the first, it proceeds upon the principle that one who intentionally injures another must answer therefor in damages. In other words, the subjective element of intention, a 'state of mind' in which the wrong-doer contemplates the probable consequences of his act and desires them to follow upon it, must always

(*a*) Many wrongs of this class are also treated as criminal offences, and, indeed, there is no moral cleavage between this group of torts and crimes involving the same grounds of complaint. The only difference is in procedure. See Pollock on Torts, 7th ed., p. 9; Harris' Criminal Law, 10th ed., p. 2.

(*b*) I have made no reference in the text to the doctrine of liability for nuisance, because it has no bearing on the main question under discussion, and I do not wish unnecessarily to add to the difficulties of mastering an abstruse subject. Nuisance is in some respects coincident with trespass, and in others it resembles negligence; but it differs from both in its salient features, and holds a substantive place in the law of torts. See Underhill on Torts, 7th ed., p. 325; Jaggard on Torts, chap. xi., p. 745, et seq.

accompany the wrongful act in cases falling under the first group. In the second group, the theory of responsibility is highly technical and peculiar. It would seem to proceed wholly upon the principle that a legal right has been invaded, without contemplating the cause or effect of such invasion. It is not necessary in such cases to show that the defendant was either 'sciens' or 'volens' in respect of doing the act which constitutes the trespass. As was said by Lord Camden in *Entick* v. *Carrington* (*a*), "by the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license but he is liable to an action, though the damage be nothing." And so with regard to trespass to goods; if the trespass involves a deprivation of possession to such an extent as to be inconsistent with the rights of the owner, the circumstances amount to a conversion. "It is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done, (if

(*a*) 19 St. Tr. at p. 1066.

such conduct can be said to be inconsistent with the title of the true owner) is a conversion" (*a*).

Turning, finally, to the third group, wrongs arising through negligence, we are confronted with a theory of responsibility which makes a standard of conduct the test of the wrongful character of the act done. That, of course, is entirely an objective basis of liability, the theory finding its *raison d'être* in the obvious justice of requiring one who has conducted himself carelessly in respect of a duty owed by him to another, to make amends for his carelessness in damages. If there can be said to be any *subjective* side to the legal doctrine of negligence it consists in a purely passive state of mind on the part of the wrong-doer toward the consequences of his carelessness, such a state of mind as negatives the presumption of intention to produce the injury suffered.

Clearly, then, if the authorities support the proposition that the element of intention does not enter into the theory of legal liability for

(*a*) Per Harrison, C.J., in *Driffil* v. *McFall*, 41 U.C.Q.B. at p. 320.

injury arising from negligence, it is both incorrect and misleading to characterize negligence as a "form of mens rea." If *mens rea* denotes 'criminal intent,' and negligence is opposed to 'intentional injury,' surely it is a mere antilogy to make such a characterization.

Let us examine some of the leading authorities for the purpose of testing the soundness of the proposition that we have just stated.

A modern writer has very truly said that "the legal duty to exercise care has its foundation in the requirements of civilized society . . The Roman Law recognized the duty of a citizen '*alterum non laedere*,' and appreciated the significance of the obligation requiring the exercise of care"(*a*). It is undoubtedly true that their doctrine of torts has been worked out by English judges on lines more or less distinctive, but that the principles of the Roman Law have been of incalculable assistance to them cannot be disputed. Particularly is this true of the subject of negligence. In respect of the state of mind of the wrong-doer, the doctrine of *culpa* in the Roman Law is in entire

(*a*) Jones on Negligence of Municipal Corporations, § 3.

agreement with the doctrine of negligence as it obtains in our law to-day; and we have never seen the Roman doctrine more accurately stated than by Ayliffe (*a*), an English writer of the early part of the eighteenth century. These are his words: "The word 'fault,' in Latin called *culpa*, is a general term; and according to the definition of it, it denotes an offence or injury done unto another by imprudence, which might otherwise be avoided by human care. For a *fault*, says Donatus, has a respect unto him who hurts another not knowingly or willingly. Here we use the word offence or injury by way of a *genus* which comprehends deceit, malice and all other misdemeanours, as well as a fault. For deceit and malice are plainly intended for the injury of another, but a fault is not so designed. And therefore, we have added the word *imprudence* in this definition to point out and distinguish a fault from deceit, malice, and an evil purpose of mind which accompanies all trespasses and misdemeanours. A fault arises

(*a*) A new Pandect of the Roman Civil Law, by John Ayliffe, (Lond. 1734), bk. 2, tit. 23, pp. 108-110.

from simplicity, a dulness of mind, and a barrenness of thought which is always attended with imprudence, but deceit, called *dolus*, has its rise from a malicious purpose of mind, which acts in contempt of all honesty and prudence, with a full intent of doing mischief or an injury."

The mental attitude of the wrongdoer in '*culpa*' is thus described by a modern commentator on the Roman law (*a*): "La faute (*culpa*), considérée au point de vue de l' acte illicite, consiste à commettre celui-ci par suite d'un défaut de soins. Le caractère distinctif de la faute est la négligence; l' auteur de l' acte illicite n'a pas prévu la lésion du droit d' autrui, ou bien s'il l'a prévu, il ne l'a point voulue; mais il n'a pas apporté à ses actions la somme de soins nécessaire."

That the Roman law basis of liability for negligence was an objective one is apparent from the last quotation and the following: "There was grave fault (*culpa lata*) where one neglected the measures of precaution that

(*a*) Van Wetter, Cours élémentaire de droit romain, 1, § 88.

every man habitually takes, under ordinary circumstances, and with due regard to the manners, the usages or the peculiarities of the place where the act is done;" or, "where, being under an obligation to another, a person had not given to the property or the business of that other the same care and attention that he habitually gave to his own. . . . The slight fault (*culpa levis*) consisted in neglecting the care which an attentive and intelligent man of business, under ordinary circumstances, habitually gave to his own affairs. (*Diligentia diligentis patrisfamilias*)" (*a*).

How close the English law approaches to this doctrine is shown by the following expressions of judges and text-writers:

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable

(*a*) Goudsmit's Pandects, § 76, pp. 213, 214. On this point see also Gaius III., 211; Savigny, Syst. III., p. 388; Heinecc. Elem. Juris Civ. III., 14, 788; and a learned article by Mr. Schuster on the "Liabilities of Bailees in German Law," 2 Law Quart. Rev. 188.

man would not do." Per Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.* (*a*).

"Negligence is the absence of care according to the circumstances." Per Willes, J., in *Vaughan* v. *Taff Vale Railway Co.* (*b*).

"Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect, the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." Per Brett, M.R., in *Heaven* v. *Pender* (*c*).

"What a man does through negligence, he does not do from a fraudulent motive. Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design." Per Fry, J., in *Kettlewell* v. *Watson* (*d*).

"There is no absolute rule as to negligence to cover all cases. That which is negligence in one case, by a change of circumstances

(*a*) 11 Exch. at p. 784.
(*b*) 5 H. & N. at p. 688.
(*c*) L.R. 11 Q.B.D. at p. 507.
(*d*) L.R. 21 Ch. D. at p. 706.

will become ordinary care in another, or gross negligence in a third. It is a relative term, depending upon the circumstances." Per Agnew, J., in *Philadelphia, &c., Railroad Co.* v. *Spearen* (*a*).

"Unreasonable conduct is usually called negligence in law, because in a standard man in the party's situation it could not arise from any other state of mind than negligence or intention, which latter the law is reluctant to to presume." Professor Terry in "Leading Principles of Anglo-American Law" (*b*).

"The state of mind of the doer of an act is often the subject of legal enquiry with a view to ascertaining whether it exhibits the phenomena of 'intention.' From the nature of the case, a similar enquiry can hardly be undertaken with a view to detecting the psychological phenomena of 'negligence.' Lawyers have, therefore, long been content, in enquiring into the alleged negligence of a given individual, to confine themselves to ascertaining whether or no his acts conform to an ex-

(*a*) 47 Penn. at p. 305.
(*b*) § 217, p. 200.

ternal standard of carefulness. Two such standards were employed by the Roman lawyers to measure that '*diligentia*' the failure to attain which they called '*culpa*.' . . . This abstract, or ideal, objective test" (the care which would be exercised, under the circumstances, by the average good citizen) "is that which is applied in modern codes, and is stated with growing clearness in the decisions of English and American courts." Holland's *Elements of Jurisprudence* (*a*).

"Negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea, and has nothing to do with a state of mind." Clerk & Lindsell on *Torts* (*b*).

"The Roman conception of delict agrees very well with the conception that appears really to underlie the English law of tort. Liability for delict, or civil wrong in the strict sense, is the result either of wilful injury to others, or wanton disregard of what is due to them (*dolus*), or of a failure to observe due

(*a*) 9th ed. pp. 105, 106.
(*b*) 3rd ed., p. 431.

care and caution, which has similar though not intended or expected consequences (*culpa*)." Pollock's *Law of Torts* (*a*).

"Negligence is the contrary of diligence, and no one describes diligence as a state of mind. The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances." *Ibid.* (*b*).

Many other authorities to the same effect might be quoted, but my purpose has been served by these already collated, and I would not weary the reader. I think it has been fairly shewn that the law, in formulating its theory of liability for negligence in civil cases, has not regarded the mental attitude of the wrong-doer, but has contented itself with fixing an external standard of conduct as the criterion of blameworthiness. To attempt to overlay this purely objective theory with subjective refinements is not such an experiment

---

(*a*) 7th ed., (1904), pp. 17, 18.
(*b*) p. 429.

as could be expected to commend itself to hard-headed practitioners, nor yet to the more academic members of the legal profession who are jealous to keep intact such symmetry as the philosophy of the Common Law up to the present time has been able to achieve.

ON THE RISE OF MUNICIPAL INSTITUTIONS.

A MUNICIPAL corporation may be described as a body-politic created by royal charter or Act of Parliament (*a*) and entrusted with the functions of local government within certain territorial limits, such as those of a city or town (*b*). Incorporation is granted at the request, express or implied, of the inhabitants of the territory or district over which the grant operates, and is intended

(*a*) In Canada municipal corporations are now exclusively created by the authority of the legislature. In England, however, by the provisions of the Municipal Corporations Act, 1882, ss. 210, 259, the ancient prerogative of the Crown to grant charters of incorporation to municipalities is expressly conserved; but the grant can only be made upon the advice of a Committee of the Privy Council and after petition made therefor by the inhabitants of the district sought to be erected into a municipality, notice of the petition having to be published in the *London Gazette* one month before it is taken into consideration (s. 211).

(*b*) See *Cuddon* v. *Eastwick*, 1 Salk. 193, where it is said "A [municipal] corporation is properly an investing of the people of the place with the local government thereof, and therefore their law shall bind strangers; but a fraternity is some people of a place united together, in respect of a mystery and business, into a company, and their laws and ordinances cannot bind strangers, for they have not a local power of government." Cf. s. 7 of the English Municipal Corporations Act, 1882.

to promote the convenience and welfare of the community.

Municipal corporations are chiefly distinguished from that species of artificial personality called quasi-corporations, first, because the former are constituted by the consent of the people living within the municipal boundaries, and, secondly, because the sphere of their corporate operations extends itself wholly within the domain of local self-government; while the latter are created by the legislature without reference to the wishes of the inhabitants of the territory over which such corporations have jurisdiction, and are simply intended to act as agencies, or auxiliaries, of the State government in administering its business within such territory. Instances of quasi-corporations in Canada are the boards of School Trustees and License Commissioners constituted by provincial statutes touching public education, and the regulation of the liquor traffic, respectively; and boards of Harbour Commissioners created by, or existing under the authority of, federal legislation. While these bodies are given

certain corporate powers by the statutes creating them, yet such powers are limited to the administration of governmental duties of a public character, and beyond that they have no characteristics of a corporation (*a*). In some of the American courts it has been held that as corporations of this class merely represent the State they are not responsible for negligence in the discharge of such public duties as are entrusted to them (*b*); and some of the earlier English cases would appear to give countenance to this view (*c*). But it is now settled law in England that unpaid statutory trustees for public purposes (such as maintaining public docks, improving streets, and the like) are responsible in their corporate, or quasi-corporate, capacity for damages arising from the negligent performance of their

(*a*) "The English law affords many, and our American law more numerous, examples of persons and collective bodies of men endowed with a corporate capacity, in some particulars declared, and without having in any other respect the capacities incident to a corporation." 2 Kent's Comm. pt. IV., p. 279 (14th ed.).

(*b*) See *Bartlett* v. *Crozier*, 17 Johns. 439; *Morey* v. *Newfane*, 8 Barb. 645; *Mower* v. *Leicester*, 9 Mass. 247; *Hill* v. *Boston*, 122 Mass. 344; *Brown* v. *Vinalhaven*, 65 Me. 402.

(*c*) See *Russell* v. *Men of Devon*, 2 T.R. 667.

statutory duty by themselves or their servants (*a*).

Thus the law relating to the liability of municipal corporations for negligence is rendered more or less intricate by the fact that they possess a dual character—on the one hand, representing the State in respect of the administration of local government, and so able to invoke the immunity of the sovereign power from legal responsibility *quoad hoc;* on the other hand, representing definite groups or communities of people in the conduct and enjoyment of their pecuniary and proprietary interests, and so subject to the same legal responsibility as natural persons. In a word the elements of both the private and public species of corporations are combined in the municipal corporation; and the social history of England shows us how the resultant of this combination achieved its present distinctive place in our political institutions.

(*a*) See *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93; *Coe* v. *Wise*, L.R. 1 Q.B. 711, reversing S.C. in 5 B. & S. 440; *Ohrby* v. *Ryde Commissioners*, 5 B. & S. 743; *Collins* v. *Middle Level Commissioners*, L.R. 4 C.P. 279.

The record of Municipal Corporations carries us back to so early a date in legal history as the Laws of the XII Tables (A.U.C. 304). Blackstone imputes to Numa Pompilius the honour of inventing corporations (*a*); others ascribe their origin to the Greeks (*b*). Whatever their origin, this much is certain, that after the subjection of Italy, as a whole, to Roman rule the term *municipium* was used to designate a free provincial town whose citizens enjoyed the plenary rights of Roman citizenship. The inhabitants of these *municipia* enacted their own local laws and usages, which were called *leges municipales* (*c*). As colonization progressed in the transmontane provinces new *municipia* were established, and the Germanic peoples found this system of local self-government admirably suited to their political genius. In Roman Britain thirty-three townships were established within a territory bounded by Winchester on the

(*a*) 1 Bl. Comm. 468.

(*b*) See Angell & Ames on Corp. Introd. s. 15; and cf. Domat, Droit Civ. ii. 457.

(*c*) Adam's Rom. Antiq. 71; and Hunter's Rom. Law 3rd ed., p. 32.

South and Inverness on the North (*a*). These were undoubtedly a modified form of the true *municipium*, the magistrates being entrusted with the administration of local police and certain judicial functions. Under the Saxons, the territory of England was broadly parcelled out into counties, or shires and hundreds (*b*) for civil purposes. Towards the close of the Saxon period the *burh*, a civil division of territory called into existence by military exigencies (*c*), foreshadows, both etymologically and politically, the *borough*, of paramount importance in the municipal development of a later period. Concerning the 'burh,' Gneist says: "Discerning rulers like Ælfred made use of the remains of old *civitates* and *castra* and other advantageous positions for fortifications, and the protection which these afforded was readily sought by the neighboring freeholders, tenants and vassals, and also by the landless

(*a*) Sir James Mackintosh, Hist. Eng. i., 30.

(*b*) Gneist (Const. Hist. Eng. i, c. iii.) demonstrates that the 'tithing,' which some authorities regard as a third civil sub-division of territory, was nothing but a military arrangement.

(*c*) 'Burh,' 'byrig,' a fortified building.

men and small tradespeople who were living among the servants and followers of the landlords. The differenees in the legal position of the people thus erowded together rendered expedient the appointment of a special royal magistrate (*gerêfa*), who was also endowed with extraordinary military, poliee and finaneial functions. At the elose of the Anglo-Saxon period the *burgenses*, and, in later times, the constitution of the English municipal boroughs, arose from these beginnings (*a*)." Green, however, is of the opinion that in their origin 'boroughs' were not military units of the people, but mainly gatherings of persons engaged in agrieultural pursuits; and he supports this view by referenee to the faet that the first 'Dooms' of London provide espeeially for the recovery of eattle belonging to the citizens (*b*). Still, whatever their origin, it is in the eonstitution of the boroughs (*c*) of post-Conquest times that we must look for the prototype of the modern municipal corporation.

(*a*) Const. Hist. Eng., i., c. iii.
(*b*) Hist. Eng. People i., Bk. iii. 300.
(*c*) Hall. Mid. Ages iii. c. 8.

Under the early fiscal system of the Normans no discrimination was made in the method of collecting tallage (*tallagium*) between the towns, or boroughs, and the rural portions of the shire,—the sheriff, as the tallager, or chief executive officer of the shire in matters of finance, having unlimited jurisdiction over both. As the dues and rents were in many instances 'farmed' by the Crown to the sheriffs (*a*), it is not surprising to find that the levies upon the towns were larger in proportion, and exploited with greater vigour, than in the case of the rural districts (*b*). Consequently the towns were not slow to seek relief from this system of oppression, and by the time of Henry I. we find the citizens of London obtaining a charter from the King, which, while not conferring upon them all the elements of a *communa*, or perfect municipality, yet freed them from arbitrary and oppressive taxation and gave them the nucleus of local autonomy (*c*). Such an example as

(*a*) Gneist, Hist. Eng. Const. 2nd ed. i, pp. 144, 145.
(*b*) Cf. Stubbs' Const. Hist. Eng. i., c. xi.
(*c*) This charter is to be found in Stubbs' Select Charters, p. 108.

this could not but stimulate the other centres of trade and population in the realm, and so history records that by the time of John it had become a common practice for the Crown to grant to the towns the right to farm their own taxes. By means of a royal charter (*firma burgi*) (*a*) the towns or boroughs were endowed with the privilege of taxing their own citizens in their own appointed way, and free from the interference of the sheriff, to meet the levy of a lump sum imposed by the charter upon the town or borough (*b*). In addition to this, the borough ultimately obtained the right, conditioned, as might be expected, upon the payment of a further tax, to hold a court leet (*c*) within the territorial limits of the borough which should exclude therefrom the

(*a*) See Madox, Firma Burgi, 18; Stubbs' C. Hist. i, c. xi. The firma burgi was a grant of a thing incorporeal; it did not convey any title in the lands of the borough to the burgesses. Pollock & Maitland, History Eng. Law, 2nd ed., i, p. 652.

(*b*) The obligations of the 'fee-farm' are still extant. In the *Attorney-General* v. *Corp. of Exeter*, 2 Russ. 53, Lord Eldon held that if a fee-farm rent was chargeable on the whole of the city, it might be demanded of any one who held property in it, and he would have a right of contribution from the other inhabitants.

(*c*) Derivation obscure, probably from A. S. 'lathian,' to assemble.

jurisdiction of the sheriff's tourn or general court leet of the shire. To put off the galling yoke of the sheriff and his tourn was the primary object of the burgesses in acquiring the *firma burgi* and the borough court leet. But the idea gradually spread among the freeholders (*a*) that the sessions of the court leet were adapted for other purposes than the purely judicial; and soon we see the beginnings of a legislative assembly. "This body at first is rather a judicial than a governing body, for the powers entrusted to the burgesses by their charter are much rather justiciary than governmental. But municipal life grows intenser and more complex; the court has to ordain and to tax as well as to adjudge, and it is apt to become a council, the governing body of the borough. Then, as trial by jury penetrates the boroughs, it sets up an important change. The old pattern of a court with doomsmen who are there to declare the law

(*a*) All the resident freeholders within the borough 'paying scot and bearing lot' were entitled and obliged to be present at the annual session of the court leet. See Broom & Hadley's Comm. iv. pp. 358, 359; Gneist's Const. Hist. Eng. 2nd ed. i., 153, note c.

gives way before the new pattern with jurors who bear witness to facts. In the town, as in the realm at large, 'court' and 'council' are slowly differentiated; the borough court becomes a mere tribunal, and by its side a distinctly conciliar organ is developed'' (*a*).

In that period of English social development in the thirteenth century when the grant of local police jurisdiction (the court leet) became co-existent with the grant of local taxation (*firma burgi*) historians profess to find the embryonic stages of British municipal institutions as they exist to-day (*b*).

It was reserved for that astute statesman Edward I. fully to apprehend the usefulness of incorporated boroughs in shielding the Crown from the popular odium against taxation. He perceived that the old right of the freeholder 'paying scot and bearing lot' to take his

(*a*) Pollock & Maitland Hist. Eng. Law, 2nd ed. i., 659.

(*b*) Gneist, Const. Hist. Eng., 2nd ed., i., pp. 152, 153, note c. Stubbs, Const. Hist. Eng., 4th ed., i, at p. 446, says : "Gneist distinctly regards the *communa*, the origin of the corporation, as the result of a combination of the *firma burgi* with the leet jurisdiction. This I entirely agree with, but the adjustment of the relation of these two elements with the guild presents some difficulties as to its universal applicability."

part in the court leet, or borough assembly, had, by his time, been undermined by the influence of the industrial and mercantile guilds, and that instead of municipal business being discharged by the mass of freeholders it was tacitly entrusted to a 'leet jury,' a select committee of capital burgesses, membership in which was controlled by the guilds and perpetuated by a system of coöptation, the 'leet jury' arrogating to itself the right to determine the qualifications of its own members (*a*). In the oligarchy of the lect jury the greatest of the Plantagenets saw a ready means for obtaining the consent of the boroughs to increased taxation for the royal revenues, without too great a sacrifice to democratic influences. By conceding to the boroughs the right of representation in the *commune concilium regni* (*b*), and by making

(*a*) In this way the guilds, although they were distinct corporations from incorporated boroughs, practically controlled municipal affairs. See Poll. & Maitl. Hist. Eng. Law, 2nd ed., vol. 1, 666, 667; Hallam's Mid. Ages, iii., 120; Beverley Town Documents, Selden Society, vol. 14, Introd. XVII.

(*b*) The 'Common Council of the realm' is first called 'Parliament' in the preamble of the Statute of Westminster I. (1275). Parliament, however, in its present constituent parts did not sit until twenty years later. See Stubbs' Const. Hist., 3rd ed., ii., 133.

Parliament responsible for the borough assessments, he was persuaded that he might exploit a general system of tolls and imposts within the realm which would yield him far larger returns than the old system of arbitrary taxation. On the other hand, the danger of popular aggression would be minimized by the fact that the election of burgesses to Parliament would be controlled by the leet jury, which, in its turn, could be easily made to respond to the wishes of the Crown. Hence we find that in the year 1295 writs were issued to the sheriffs directing the return to Parliament of two knights from each county, two citizens from each city, and two burgesses from each borough, "*ad faciendum quod tunc de communi consilio ordinabitur in praemissis*" (*a*). Thus by one sovereign act municipal institutions were given a definite place in the polity of the Kingdom, and the British Parliament, "the archetype of all the representative assemblies which now meet either in the old or new world" (*b*) was created. But while

(*a*) Taswell-Langmead Const. Hist. Eng., 4th ed., p. 261.
(*b*) Macaulay's Hist. Eng. i., c. i.

posterity's meed of praise is undoubtedly due to Edward I. for his great constitutional achievements, we must not allow the eulogies of historians to obscure the fact that they were motived by the exigencies of the royal purse rather than by any grand and deliberate scheme of constitution-building (*a*). That he had the wit to measure the political bearings of his experiment, and the courage to crystallize into a broad principle of statecraft that which he had tentatively exploited as a mere scheme of finance, stamps him as one of the world's greatest men.

How amenable the boroughs were to the Crown's will is thus described by the historian Green: "It was easy indeed to control them, for the selection of boroughs to be represented remained wholly in the King's hands, and their numbers could be increased or diminished at the King's pleasure. The determination was left to the sheriff, and at a hint from the royal council a sheriff of Wilts would cut down

(*a*) Compare in this connection, Stubbs' Const. Hist., 3rd ed., ii., 306, and Green's Hist. Eng. People, ii, c. iv., p. 152, with S. R. Gardiner's Hist. Eng., i., p. 21.

the number of represented boroughs in his shire from eleven to three, or a sheriff of Bucks declare he could find but a single borough, that of Wycombe, within the bounds of his county'' (*a*).

The mischievous system of local government by means of 'select bodies' in the time of the Tudors, and later, is fully described by Sir T. E. May (Const. History Eng., iii., 279, 283). He tells us that in the reign of Henry VII. the burgesses, for the purposes of national as well as local government, were put beyond the pale of the constitution. By the creation of the office of 'High Steward,' a prototype of the modern political boss in America, the borough franchise was so manipulated that only the 'proper sort,' from the point of view of the corruptionists, were sent to Parliament. Thus the power of the Crown and aristocracy was increased at the expense of the basic liberties of the people.

The boroughs continued their existence in history as the puppets of the Crown down to

(*a*) Hist. Eng. People, ii, c. iv.

the second quarter of the nineteenth century, when the democratic tendencies of the age could no longer brook municipal government by a select body chosen at the bidding of the King. In the year 1835 the Municipal Corporations Reform Act (5 & 6 Wm. IV. c. 76) was passed, the object of which was to restore municipal corporations to their original basis, namely, as institutions entrusted with powers of local self-government and controlled by the general suffrages of those resident within the jurisdiction, and not by a chosen few. Between 1835 and 1882 the needs of municipal reform demanded some thirty-two legislative enactments. These are now consolidated in the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which is thus described in a recent work of high authority: "In substance it is the outcome of Anglo-Saxon characteristics. Law and liberty are happily blended in it, and the result has been that in the municipal borough of to-day we have the evolution of the highest type of local self-government, a type admirably adapted to secure the well-being of the inhabitants, and to train them to

discharge the duties of citizenship in a larger and imperial sphere'' (*a*).

Within the Dominion of Canada the growth of popular municipal institutions has been a slow one.

In Lower Canada from the early days of the French occupation down to a comparatively recent date local self-government was an unknown quantity. Two causes were chiefly responsible for this. The oligarchy established by the French King in 1663 scrupulously excluded from the management of public affairs every semblance of popular dictation. The Intendant, in many ways the protagonist of this *comédie politique*, apparently cared not who made the songs for the settlers of His Most Christian Majesty so be it he could make their local laws (*b*). In the next place the *habitants* evinced a deep-rooted prejudice against any system of local taxation, a matter

(*a*) Ency. of Law of England, IX., 29.

(*b*) See an interesting account of the Intendant's powers in a monograph by R. S. Weir, D.C.L., on Municipal Institutions in Canada, contained in Hopkin's Canada, an Encyclopædia, vol. 5, p. 452. Dr. Weir quotes De Tocqueville's opinion that the Canadian Intendant had much greater power than the French functionary who bore the same title.

which would naturally be involved in the establishment of any measure of democratic municipal government (*a*). Later on in the history of New France the colony was parcelled out into parishes with a seigneur in authority over each, whose power in the main was a reflex, and no feeble one, of that of the Intendant over the whole colony. These parishes were first given a civil status by an edict of the Council dated 2nd March, 1722; but, as will be gathered from what we have already said, they in no sense brought the people nearer the goal of local self-government.

During the military *régime* which supervened upon the conquest of Canada by Great Britain, it was not to be expected that matters of merely local concern would occupy the attention of the rulers of the colony; but even in the Quebec Act, passed more than ten years after the cession, no provision was made for the establishment of local self-government in a territory which then comprised among its inhabitants not only French-Canadians, but many settlers who were of English birth.

(*a*) See Bourinot: How Canada is Governed, p. 219.

How far the United Empire Loyalists succeeded in pushing forward democratic municipal government in spite of this lack of legislative authority, and the frank hostility of those who ruled the country, will appear when we deal more particularly with the history of the subject in Upper Canada.

To return to the history of Lower Canada, although the attainment of representative municipal institutions there was delayed to an extent hardly explicable by the troubles appearing on the political record of the province —retarding as their influence was in this behalf, notwithstanding—yet we think Sir John Bourinot's dicta (*a*) that "Until 1841 the legislature of Quebec was practically a municipal council for the whole province," and that "The Union of 1841 led to the introduction of municipal institutions in both the provinces [Upper and Lower Canada]" cannot be unreservedly accepted as correct. The cities of Montreal and Quebec received their first municipal charters in 1832; and so early as the year 1799 (39 Geo. III. c. 5) the legis-

(*a*) How Canada is Governed, p. 219.

lature of the province had clothed the Justices of the Peace of Quebec and Montreal, convened in their Courts of Quarter Sessions, with a very large measure of municipal jurisdiction in respect of the several country districts into which the province was at that time divided. In view of these facts it is hardly accurate to say that the legislature discharged the functions of a conciliar body in municipal matters down to 1841. Furthermore, the legislation in which inhere the *origo et fons* of local self-government in Quebec was passed in the year 1840; in no wise was it post-union legislation, but, on the contrary, it was an Ordinance of the Special Council (4 Vict. c. 4) "to provide for the better internal Government of this Province [Lower Canada] by the establishment of local or municipal authorities therein."

The last-mentioned enactment, among other things, provided for (1) the division of the province into districts, each district to be a body-corporate; (2) the existence of a council in and for each district, composed of a Warden and councillors; (3) the appointment of the Warden to be made by the Governor

under the great seal of the province; (4) *the election of councillors, to be made by the inhabitant householders;* (5) the right of every parish and township having a population of 3,000 and upwards to elect two councillors for the district in which they were situated; (6) the qualifications of councillors; (7) the making of by-laws by each district council with respect to roads, bridges and public buildings, the purchase and sale of real property, the establishment and maintenance of schools, the assessment and levying of taxes for district purposes, the remuneration of parish and district officers, and for the maintenance of a system of police. Provision was also made for the incorporation of parishes and townships within the district. Beyond peradventure, the student of democratic municipal institutions may rest his labours of research into the matter of their beginnings in Lower Canada when he puts his hand upon the Ordinance, 4 Vict. c. 4.

The next important piece of legislation touching the matter in hand was the 8 Vict. c. 40, which made the office of mayor elective;

and two years later, by 10 & 11 Vict.c. 7, any town or village comprising not less than forty houses, within an area of not more than thirty arpents, was enabled to become incorporated. But the most notable measure for which the last-mentioned Act was responsible was the abolition of parish and township municipalities, and the erection of county municipalities in lieu thereof. In 1855 (18 Vict. c. 100), the Lower Canada Municipal and Roads Act was passed, which was a very general revision and amendment of previous enactments on the subject. It reorganized the whole municipal system of the province, and, in lieu of the old subdivision, established (1) county, (2) parish and township, (3) town and village municipalities, all of which were to be governed by *elective* councils. This enactment is for the most part in force to-day, and its amended provisions will be found, in connection with cognate legislation, in Arts. 4178 to 4640 of the Revised Statutes of Quebec. Together with the Municipal Code these articles constitute the corpus of local law binding upon all municipal corporations in the province other

than those cities and towns which enjoy the privilege of special incorporation.

This is, in brief, the story of the rise of local self-government in the Province of Quebec.

Dealing, now, with the growth of popular municipal institutions in the Province of Ontario, we remarked at a previous place that we should have something to say here concerning the part played by the United Empire Loyalists in the struggle for democratic municipal institutions in the unpropitious days of the Quebec Act and British distrust of popular bodies in the colonies.

It was largely owing to the actively manifested dislike of the Loyalists to the provisions of French private and proprietary law, imposed on them by the Quebec Act, together with their demands for representative institutions, that the British Parliament passed the Constitutional Act of 1791. But even under the restrictions of the Quebec Act these builders of Canadian political liberty, stimulated thereto by their knowledge of the value of local institutions in the revolted colonies

whence they came (*a*), had broken up the desert and prepared the ground for the sowing of the seed of local self-government in the western part of the colony. Soon after their arrival commissions of the peace were issued to several prominent Loyalists for the preservation of order in the newly settled districts (*b*); and in 1785 an Ordinance was passed by the Governor and Council "for granting a limited civil power and jurisdiction to His Majesty's Justices of the Peace in the remote parts of this Province" (*c*). Following upon this and in pursuance of the authority of an Ordinance passed in 1787, Lord Dorchester issued a proclamation creating four districts, namely Lunenburg, Mecklenburg, Nassau and Hesse, in the territory of what was afterwards called the Province of Upper Canada, and at the same time made provision for the organization of Courts of Sessions of the Peace in and for the several districts above named (*d*).

(*a*) See Shortt: Municipal Government in Ontario, Toronto University Studies in Hist. and Econ., vol. II., No. 2, p. 5; and cf. McEvoy's Ontario Township, p. 20.
(*b*) Can. Archives, B. vol. 65, p.28.
(*c*) Laws of Lower Canada, vol. I. p. 98.
(*d*) Canadian Arch., Q vol. 37, p. 178; Q. vol 39, pp. 134, 139.

This was the origin of the Courts of Quarter Sessions in Upper Canada, and they, like their kindred institutions in Lower Canada, formed a stepping-stone between the oligarchic rule of the Governor and Council in matters of purely local concern, and the full measure of municipal self-government which the people were privileged to obtain under the Baldwin Act of 1849. How closely these Courts of Quarter Sessions repeated the history of the old English court leet in respect of superimposing local legislative and administrative jurisdiction upon what was originally a grant of local judicial functions only, is apparent from the following observations of Professor Shortt, in his *Municipal Government in Ontario* (*a*): "The dutics of the Courts of Quarter Sessions, as interpreted and exercised, were partly judicial, as in connection with the maintenancc of the peace; partly legislative, as in prescribing what animals should not run at large, or what conditions should be observed by those who held tavern licenses; and partly administra-

(*a*) University of Toronto Studies in History and Economics, vol. 2, p. 4.

tive, as in appointing certain officials and in laying out and superintending the highways." But there was this all important difference between the court lect and these Courts of Quarter Sessions from the view-point of local self-government, the former was a popular body composed, as we have shown, of freeholders 'paying scot and bearing lot,' while the latter was composed of mere nominees of the Crown.

Prior to the passing of the Constitutional Act of 1791 it appears (*a*) that the settlers in the townships of Fredericksburg and Adolphustown had attempted to hold town meetings; and one of the first demands for legislation after the organization of the Province of Upper Canada was embodied in a Bill "to authorize town meetings for the purpose of appointing divers parish officers." This Bill met with the opposition of Governor Simcoe who, true to his theory that "an aristocracy [was] most necessary in this country" (*b*),

(*a*) See Appendix to Report of Ontario Bureau of Industries, 1897; and Canniff's History of Ontario, 454.

(*b*) See Canadian Arch., Q. vol. 279-1, p. 85.

viewed with distrust "the elective principle in town affairs" (*a*). But in the second session of the Parliament of Upper Canada (1793) the Act 33 Geo. III. c. 2, entitled "An Act to provide for the Nomination and Appointment of Parish and Town Officers within the Province" was duly passed. This Act has been called "the germ of our democratic system of municipal institutions" (*b*) in Ontario, and truly so; but the germ was not allowed to flourish and become robust without an attempt being made by the adherents of aristocratical local government to provide an antiseptic. The 'germ,' subsisting in the provisions of the last-mentioned Act, was the concession of the right to the 'inhabitant householders' (*i.e.*, rate-payers) of electing certain officers, such as parish or township clerks, assessors and collectors of taxes, etc.; the 'antiseptic' was supplied by 46 Geo.III. c. 5, which enacted that if no town meetings were held on a single given date in any town-

(*a*) See his report to the Home Government in Canadian Arch., Q. vol. 279-1, p. 83.

(*b*) Biggar's Municipal Manual, p. 3.

ship, the Justices in Quarter Sessions were to nominate and appoint such parish and town officers.

Beyond the innocuous power, conferred by the Act of 1793, of determining the height of lawful fences, and the right acquired in the following year of limiting the times and seasons for horned cattle, and certain other animals, to run at large (*a*), the town meetings enjoyed no legislative functions; but, as Mr. McEvoy says (*b*): "Public sentiment on the largest public questions was here fostered. This, however, was not so important or valuable as that quality of mind which was developed. Little as was their law-making power, it was enough to show every man present the real necessity for laws, how laws were made, that laws were simply rules which ought to be the most advantageous that could be devised for the community, and that the community had an undoubted right to change these laws if they saw that a change would be an improve-

---

(*a*) 34 Geo. III., c. 8.

(*b*) The Ontario Township: Toronto University Studies in Pol. Science, 1st ser., No. 1.

ment. It was the conception of law that was fostered in the men of Ontario by their town meetings which led in a large measure to the establishment of responsible government in this province." In this passage Mr. McEvoy says as much for the early Ontario town as a factor in achieving political freedom as Professor Bryce said for its New England prototype, viz.: "Towns . . . are to this day the true units of political life in New England; the solid foundation of that well-compacted structure of self-government which European philosophers have admired, and the new States of the West have sought to reproduce. (*a*)". Moreover, both writers justify the correctness of De Tocqueville's opinion that "local assemblies of citizens constitute the strength of free nations. Town meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it" (*b*).

The principle of election to all town offices in Ontario gradually developed after the

(*a*) "The American Commonwealth," vol. 1, p. 562.
(*b*) Democracy in America, vol. 1, c. 5.

period we have just been considering. In process of time the Courts of Quarter Sessions were relieved of their power to legislate in respect of markets, roads and streets, nuisances, fire protection, etc., and representative bodies annually elected by the rate-payers succeeded to their functions both legislative and administrativ The towns began to agitate for autonomy in the first quarter of the last century; and while Kingston did not obtain its charter of incorporation until 1838 (four years after that granted to Toronto) yet it was the first town to obtain *a measure of local government.* In 1816 the legislature passed 56 Geo. III. c. 33, to enable the magistrates in Quarter Sessions to regulate matters of police in the town of Kingston; and a similar privilege was extended to the towns of York, Sandwich and Amherstburg in the following year (57 Geo. III. c. 2). But the first general measure of local self-government passed after the Parish and Town Officers Act of 1793 was the 56 Geo. III. c. 36, establishing common schools in the province. By section 2 thereof the inhabitants of any town, township, village,

"or place," were empowered "to meet together for the purpose of making arrangements for common schools." Professor Shortt very pointedly comments (*a*) upon so important a function as that of selecting school-trustees being entrusted to men who were presumably deemed incompetent by the legislature to elect representatives to look after streets, carters, nuisances, and the like.

We have said that Toronto was incorporated and given local self-government in 1834, and that Kingston secured its charter in 1838. About this period many other towns had sought special Acts in the nature of local government. While the Bills had no difficulty in passing the popular chamber, some were defeated in the legislative council, whose attitude at that time was invariably one of hostility to popular institutions. On the other hand, down to the union of the provinces in 1841, the rural municipalities had not materially advanced beyond the measure of local self-government which they had obtained in 1793. In 1837 the Act 33 Geo. III. c. 2 (Parish and

(*a*) Op. cit., at p. 17.

Town Officers Act), with its amendments, was consolidated and re-enacted as the Township Officers Act (1 Vict. c. 21); but it was not until the passage of the District Councils Act, 1841, that the real foundation stone of the present municipal system in Ontario was laid. This Act transferred the local government powers of the Justices in Quarter Sessions to elective District Councils; and was followed by a more complete reconstructive measure in 1849 (The Baldwin Municipal Act), which is practically the frame-work of the present Municipal Act.

"The Baldwin Act," says Mr. Biggar, in his exhaustive and able work (*a*) to which we have previously referred, "and its lineal descendants have in their turn become the progenitors and paradigms of the Municipal Institutions Acts in force to-day in nearly every province of the Dominion."

(*a*) The Municipal Manual, p. 9.

THE LAW AND THE KING.

Rex non potest peccare—ahem!
MR. JUSTICE DARLING in *Scintillae Juris.*

SIR HENRY FINCH, one of the ablest of the many great English writers of the seventeenth century, said that "the sparks of all the sciences in the world are raked up in the ashes of the law."

But yet one gets a very sad impression of the science of law in turning over the pages of general literature. Not only in the works of the professed satirists, from Horace to Dickens, do we find it impugned; but we meet with its studied disparagement in the most sedate plane of the literary sphere, in the poetical masterpieces of Shakespeare and Tennyson, in the philosophical essays of John Stuart Mill and Frederic Harrison (*a*). Do the flippant pleasantries of the 'man in the street' at the expense of the majesty of the law ever lack an appreciative ear; or does custom ever stale for

(*a*) See Order and Progress, passim. I do not forget that Mr. Harrison is a barrister.

us the old, old story of covetous lawyer and credulous client?

Let us pause for a moment to recall one or two *jeux d'esprit* of the sort designated, and see if they have lost their quondam charm for us. Macklin makes one of the characters in his *Love à la Mode* say: "The law is a sort of a hocus-pocus science, that smiles in yer face while it picks yer pocket." Listen to old George Stevenson's lampoon on the law: "Law is law—law is law; and as in such, and so forth, and hereby and aforesaid, provided always, nevertheless and notwithstanding. Law is like a country dance: people are led up and down in it till they are tired. Law is like a book of surgery: there are a great many desperate cases in it. It is also like physic: they that take the least of it are best off. Law is like a homely gentlewoman: very well to follow. Law is also like a scolding wife: very bad when it follows us. Law is like a new fashion: people are bewitched to get into it; it is also like bad weather: most people are glad when they get out of it." Here is a story illustrative of Peter the Great's contempt for

the legal profession. Being at Westminster Hall in Term time, and seeing a great number of people swarming about the courts, he inquired: "Who are all these busy people?" "Lawyers," was the reply. "Lawyers!" cried the great monarch, "why, I have but four in my whole kingdom, and I purpose to hang two of them as soon as I get home." Henry Fox, in the course of a philippic against Lord Chancellor Hardwicke, exclaimed: "Touch but a cobweb in Westminster Hall, and the old spider of the law is out upon you with all his vermin at his heels." Douglas Jerrold, too, is not without his fling at our unhappy science: "Self-defence," he remarks, "is the clearest of all laws; and for this reason —the lawyers didn't make it!" Even the sober and sedate Benjamin Franklin, who, as a statesman, ought really to have done better by us, cannot forbear to launch a satirical shaft at the hard-beset quarry. This is his characterization: "A country-man between two lawyers is like a fish between two cats." And lastly in this connection, let us quote a piece of proverbial philosophy by Josh Billings:

"Every man should know something of law. If he knows enough to keep out of it, he is a pretty good lawyer!"

Now what is the secret of this dislike of the law on the part of the hard-headed men of the world whose words we have just quoted? Surely not the belief that the law is an evil thing that it behooves society to purge itself of—for, in the present stage of human progress, law is at once the guardian and bulwark of society. No clear-headed thinker will deny that. "*Force*," says Joubert, "*Force till Right is ready!*" Law is civilized force, and

—"because right is right to follow right,"

will not be the rule of action for every man until the millennium. Nor can it be that our critics espouse the view that the whole legal profession is an aggregation of knaves; that would be a reflection upon their good sense and judgment. Nor yet can we trace their attitude to the underlying motive of Jack Cade's minion when he cried: "The first thing we do, let's kill all the lawyers!" No, the secret of their hostility lies in that instinctive

resistance to the restraints positive law of necessity imposes upon natural liberty, which you will find in the minds of the best of men if you probe them deep enough. One of the satirical poets of America has said:

> "No man e'er felt the halter draw
> With good opinion of the law;"

but as a matter of fact this sentiment is not confined to the unhappy rogue who is called upon to suffer for his crimes. Is it not often the case that the same man who to-day lifts up his voice in Parliament in glowing eulogy of British political institutions will to-morrow, under the smart and perturbation which are his who has failed in some civil action at law, denounce the judges as venal, the lawyers as thieves, and the law itself as the very nidus of iniquity? To pay Customs duties with cheerfulness is surely an acquired moral taste; and to stay one's hand with a fishing-pole in it, when the trout are jumping in a preserved stream, is not exactly a survival of the habits of primitive man.

And so we are brought face to face with the law every moment of our lives, and cannot

escape the touch of its strong hand try as we will. It probes the very pith and marrow of society. "The progress and development of law," says Lord Avebury (*a*), "is one of the most important sections of human history." And Paterson in his fine work on the *Liberty of the Subject* (*b*), observes that law is "the greatest and most potent body of knowledge which concerns the children of men—a knowledge which reaches, directly or indirectly, all stations and classes, and challenges the attention of governors and governed alike, searching the roots of social life far and wide." Then let us understand at this stage what 'the Law' is, for until we have a clear apprehension of the province of the science as a whole we cannot expect to examine intelligently that portion of it which is our present theme.

In the first place, let me say that many are the uses of the word 'law.' There is hardly another term in our language around which centres such a confusion of ideas. A mere

(*a*) Lubbock's Orig. of Civ. p. 300.
(*b*) Vol. I. p. 7.

glance at one of the standard dictionaries will verify my statement. It is a far cry from the point where the word means the constant mode or order of operation which pervades the inanimate universe, to that where it denotes a system of rules governing the players in a game of cards. Yet we commonly speak, without any sense of incongruity, of Kepler's laws of motion and Dalton's law of gases, on the one hand, and, on the other hand, of the laws of whist. Strange to say, no class of thinkers have done so much to promote this ambiguity of meaning as the lawyers themselves. They seem almost wilful in their neglect to limit it to the government of rational and volitional beings. Blackstone, in his well-known declaration of the unity of law (*a*), merely affirms for the English school what Montesquieu (*b*) had already said for the continental jurists. Both adopted the theory, everywhere current up to the great renascence of legal study in the nineteenth century, which predicated all the phen-

(*a*) Comm. I. Introd. 39.
(*b*) Esprit des Loix, I., c. i. p. i.

omena of order and harmony, both in the physical and political world, as the results of obedience to the fundamental law of the Creator. Although we find this doctrine expounded by such theologians as St. Thomas Aquinas (*a*) in the thirteenth century, and Hooker (*b*) in the sixteenth, we have to go back to pagan philosophy, to Chrysippus (*c*), the Stoic, and Cicero (*d*), to find not indeed its origin, for that extends itself into a more remote antiquity, but perhaps the earliest definite statement of it. Still it must be confessed that we of the English tongue are in worse case in respect of this confusion of ideas than either the citizens of Imperial Rome or those of modern European States. For in the Latin we have two words signifying 'law': *jus* being the generic term for the whole body of legal rules and relations, and *lex* denoting only so many of them as inhere in legislative enactment. So in French we have *droit* and *loi*, and in German

(*a*) I. 2 Qu. 91, Art. 2.
(*b*) Eccl. Pol. i. c. 18.
(*c*) Apud D. Laert. vii., 88
(*d*) De Leg. ii. 4.

recht and *gesetz*, expressing the same distinction in meaning as the two Latin words above quoted. On the other hand, the single word 'law' in English not only embraces the two great sub-divisions of jural science, namely, custom and legislation, but has also to do duty in physical science as denoting the method of natural phenomena. Indeed, so various are the uses of our word 'law' in the theoretical and practical sciences that it would require more space than I have allotted to my whole subject to discuss them with measurable completeness. Let me then conclude my brief excursion into the seductive domain of philology, by declaring that the law I treat of here is what Sir William Markby has so happily phrased as 'the law of the lawyer.'

Now the 'law of the lawyer,' or, to use the more pretentious locutions of the schools, positive law or jural law, I would venture to define as : *The aggregate of the various limitations which the sovereign power in a State imposes upon the natural liberty of its individual members in order to secure the well-being of Society.*

Of course I am well aware that such a definition will savour of heresy to the disciple of Sir William Blackstone. But to the latter-day student my refusal to flog laboriously the dead horse of Blackstone's definition of positive law (or as he styles it: 'municipal law') cannot fail to commend itself. So far as the great eighteenth century commentator is concerned, it is not necessary for me to say more than that if we accept his declaration that the totality of positive law is: "A rule of civil conduct, prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong," (*a*) then we must assume that in the law we shall find a criterion of proper behaviour in all the situations and conditions of social or civil life; and, moreover, that we need not concern ourselves about any well-doing that is not commanded by the law, nor fear that we may do wrong if any contemplated act be not forbidden by it. To understand the fallacy of this assumption we have only to reflect that the law commands but a very small proportion of the acts that

(*a*) Comm. bk. i., Introd. 44, 45.

constitute one's conduct in the multifarious concerns of civil life, and that its prohibitions are correspondingly few. As Professor Sheldon Amos so pithily says: (*a*)

"A man may be a bad husband, a bad father, a bad guardian, without coming into contact with the rules of a single law. He may be an extortionate landlord, a wasteful tenant, a hard dealer, an unreliable tradesman, and yet the legal machinery of the country may be quite powerless to stimulate or chastise him. He may be, furthermore, a self-seeking politician, an unscrupulous demagogue, or an indolent aristocrat, and yet satisfy to the utmost the claims of the law upon him. Nevertheless it is just in the conduct of these several relationships that the bulk of human life consists, and national prosperity and honour depends."

And all this seems to imply that the attitude of the law toward men in Society may be summed up in the declaration: "So long as you do not infringe my prohibitions, be as wicked as you please!" But this is only true

(*a*) Science of Law, p. 30.

in a qualified sense. It is true the law does not seek to enforce abstract morality; but, on the other hand, it frequently coincides with what theologians call 'external' morality. For instance, the eighth commandment of the Decalogue is a rule of outward conduct; and so is the prohibition of theft in the Criminal Code of Canada. Yet the law does not punish stealing because it is an offence against God, but because it is an injury to the security and well-being of the State, the conservation of the latter being the sole object of positive law (*a*). Again, positive law often makes actions which are morally right, legally wrong. So far as abstract conceptions of right are concerned, a man is at liberty to build his house of any material or in any manner he pleases; but municipal by-laws prevent him from building it of wood within the limits of a prescribed fire-area. "May I not drink whiskey made in Scotland?" says the thirsty toper in

(*a*) Wise old Sir Thomas Browne is obviously conscious of this truth when he says: "Let not the law of thy country be the non-ultra of thy honesty; nor think that always good enough which the law will make good." See his Christian Morals, sec. xi.

Canada. "Not until you have paid us duty thereon," answer the Customs and Tariff Acts. "May I not marry whom I choose?" cries the disciple of Rousseau. "You are not free to marry a ward-in-chancery without the consent of the court," replies the law of the 'Little Englander.' And so *ad infinitum*. Aristotle (*a*) thought that civil Society was founded that its members might live righteously, for, he says, "the first care of the legislator must be that the citizens should be virtuous, otherwise civil Society would be merely an alliance for self-defence". This conception modern lawyers do not approve, preferring to assent to some such proposition as that of the Chinese Code (*b*), viz.: "that the chief ends proposed by the institution of punishments in the empire have been to guard against violence and injury, to repress inordinate desires, and to secure the peace and tranquillity of an honest and unoffending community."

Men cannot be legislated into righteousness; but, as Ashhurst, J., said over two hun-

(*a*) Pol. bk. iii, c. 11.
(*b*) Staunton's Code of China, lxvii.

dred years ago,(*a*) "it is in the power of the law to take from evil-minded men the ability of doing mischief, and to restrain them of that liberty which they so grossly abuse." Law constrains a man's outward acts as a member of Society; it does not presume to exercise a moral censorship over him. It estimates his conduct solely in conformity to an external standard. The absurdity of attempting to implant the seeds of virtue by physical sanctions is well exemplified by the story told of a famous head-master of one of the great English public schools: "Boys," he exclaimed at the conclusion of an admonitory harangue, "Boys, if you are not pure in heart, I'll flog you!"

And so we learn, then, that the domain of the law is not coterminous with that of morality, although there are occasional points of intersection between them. But when we enter upon the study of jurisprudence, we must not only dissociate law from morality; we must, furthermore, not be misled by the vulgar error that law is not entitled to respect unless it squares in extent and harmonizes in

(*a*) 22 St. Tr. 234.

spirit with natural justice. The demand of our friend the 'man in the street' that "law shall be justice," never ceases to amuse the law-maker. He is prompted to answer: "Discover to me your eternal principles of justice, and I shall crystallize them into statutes. I do not find them categorically stated in the scriptures of revelation; and the Greek poets tell me that Astraea left the earth with the passing of the Golden Age. Failing then to find a code of natural justice sufficient to meet every exigency of civil life, I must create artificial canons of right which will not be perfect because they are of human origin, but which will be the best possible rules of outward conduct to be observed by men as members of Society." We would, therefore, bid our thoughtless critic of the law not only to go to the Greek and Roman philosophers but to the classic poets as well, if he would understand the distinction between natural and positive justice. Homer employs the term θέμιστες (*a*) to denote celestial decrees directly communicated to mundane tribunals

(*a*) In the Odyssey, xvi, 403 for example.

for their guidanee. In Sophocles (*a*) we find Antigone appealing from the edict of King Creon to the

ἄγραπτα κἀσφαλῆ θεῶν
Νόμιμα,

("the unwritten and stable laws of the gods") and Horace emphasizes the distinetion in this wise :

"Vir bonus est quis?
Qui consulta patrum, qui leges juraque
servat."

—"Who is a good man ? He who observes the deerees of the fathers, and human laws as well as the laws of nature."

Beforc leaving the question of the relations of positive law to morality and natural justiee, I dcsirc to pay a tribute to the great service done by modern English philosophical jurists in differentiating legal and ethieal scienee. In no other school has this been done so thoroughly and so well. Referring more partieularly to the Germans, and remembering the great precision of thought whieh generally eharaeterizes them, onc marvels at the failure of their philosophers who toueh upon the subjeet to distinguish the provinces of Law and

(*a*) Antig., 454.

Ethie (*a*). In eommenting on this faet Professor Sheldon Amos says (*b*) :

"The result of this philosophic tendeney in Germany has been to merge the scientific treatment of law in the larger region of general ethical enquiry; and consequently, instead of the science of law making an even and independent progress of its own, it has undulated with every wave of ethical speculation, and has consequently suffered the retardation ineident to the growth of the most involved, because the most eomposite, braneh of intelleetual research."

Indeed it would seem to be as hard for a speculative jurist to avoid digression in German as Heine found it to be witty in that tongue. Leroy-Beaulieu's descriptive phrase for these writers is (*c*) 'eloudy jurisconsults'. Really, they do seem for the most part to be *in nubibus*.

Now we would have the support of so distinguished an authority as Sir William

(*a*) With the possible exception of Kant. Cf. his Tugendlehre, Werke, vii, p. 182; Rechtslehre, Ibid. p. 27.
(*b*) Science of Law, p. 2.
(*c*) The Modern State, ch. ii. p. 25.

Markby (*a*) if we should claim the honour of founding the science of law for John Austin, an Englishman, whose fine work, entitled the *Province of Jurisprudence Determined*, forever removed the reproach erstwhile so frequently flung at the English people by Continental writers, namely, that while they were the most law-abiding people in the world they were as ignorant of, and as indifferent to, the philosophy of law as the Hottentots. Thanks mainly to Austin we have the pleasurable assurance that to-day no man of any race may consider himself to have a proficient knowledge of jurisprudence unless he is familiar with the contributions of Englishmen to the literature of the science.

Let me now, in the interests of clear understanding, restate my definition of positive law before we proceed to examine that branch of it which has to do with the legal perfection of the King of Great Britain and the Dominions beyond the Seas, the theme proper of my present observations:—*Positive law is the aggregate of the various limitations which the*

(*a*) Elem. of Law, 4th ed. sec. 12, p. 4.

sovereign power in a State imposes upon the natural liberty of its individual members in order to secure the well-being of Society.

And yet I fear I must pray His Impeccable Majesty to wait in the ante-room of your attention until I make clear to you (1st) what a 'State' is; and (2ndly) what is generally meant by the 'sovereign power' in a State.

"He who would enquire into the nature and various kinds of government," says one of the great publicists of the past (*a*), "must first of all determine 'What is a State?' "

When *le Grand Monarque*, in the middle of the seventeenth century, enunciated his famous *mot, L'état, c'est moi!* (*b*) he was only wrong in that he failed to discriminate between the political unit, the State, and the political entity which was then its ruler in France, viz., a despotic King. In short, he confounded absolute sovereignty with delegated sovereignty. And this lack of political insight was char-

(*a*) Aristotle : Pol., iii., I.

(*b*) Allen (Roy. Prerog. p. 25) says that this declaration of Louis XIV claims no larger measure of despotic power than the Attorney-General claimed for the King of England so late as the year 1794, during the progress of the trial of Thomas Hardy for High Treason. See 24 How. St. Tr. 243.

acteristic not only of French kings but also of the French people down to a comparatively recent period in history. In 1852 when the people were asked if they would be governed by Louis Napoleon or by an Assembly, they answered: "We will be governed by the one man we can imagine, not by the many people we cannot imagine!" (*a*). Thanks to the Puritan political philosophers, the English were earlier and better taught the difference between positive and representative sovereignty; although we have to confess that so late as the time of Blackstone we find apologists for the divine right of kings among English jurists. However, by that time so diluted with mere sentiment had the argument for the theory become that its toxic properties required no antidotes to be administered by the doctors of the law. But this is mere digression.

Karl von Savigny truly says that a People is a natural unit as contrasted with a State which is an artificial unit (*b*); but, as Professor Holland points out, (*c*) when he

(*a*) See Bagehot : Eng. Con. p. 34.
(*b*) Savigny : System, i. p. 22.
(*c*) Jurisprudence, cap. iv.

declares that the natural unit never exists in history without its bodily form the State, he forgets the distinction drawn by Aristotle (*a*), who instances the Arcadians as constituting an ἔθνος until they founded a City, and so became a πόλις, a community in the law (*b*). So far from a given people and the State being co-extensive we know that some European States—Austria and Russia for instance—embrace several peoples, the former including Germanic, Slavic, and Magyar races, and the latter Slavic, Finnish and Tartar peoples. Again the Jews are a nation at large. "Nothing," says Leroy-Beaulieu (*c*), "can be more false than this conception. The whole of history contradicts it, and the present even more than the past. We must not confuse the free regions of the surrounding social medium, the Society, with its spontaneous movement, ever creating new

(*a*) Pol. ii, 2, 3

(*b*) Strange to say the conception of a State in the mind of the average statesman of ancient Hellas never got beyond the limitations of a City. Plato, however, declares in the *Republic* that the State may grow to the extent of its possibilities for unity.

(*c*) The Modern State, c. iv., p. 50.

combinations with an inexhaustible fertility; we must not, I say, confuse this with that apparatus of force and coercion which is called the State."

And yet it is not easy to define the actual, concrete State as distinguished from a Nation or a People. Possibly I would satisfy the critical instinct of the political scientist if I were to declare that the State is simply the embodiment of governmental powers. But I will not make myself clear to everyone unless I formulate the criteria, or rather the phenomena, of the State.

In the first place, then, it will be seen that the State manifests itself as the organization of a people for the establishment of Government,—if the organization be not for this great political end then it will have no greater status in International Law than a combination of men for commercial purposes, such as a joint-stock company, or for religious purposes, such as an incorporated church. Secondly, it will be seen that a State always exists within definite geographical boundaries. Thirdly, it is to be noted that it must possess an organ of

government capable of making and enforcing law within the community—for, as Austin (*a*) puts it, "in order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior determinate as well as common." And fourthly and last, it will be observed that a 'simple' State—by this the publicist means an *independent* State—must not only be supreme within its own borders but must also not be subject to any extra-territorial control. Let me add, by the way, that in this last category there inheres a very adequate test of the essential difference between a People and a State, above alluded to. The people resident within certain geographical boundaries of the civilized world are not free to do as they will because they are subject to the governmental control of the State; while on the other hand the State is absolutely free and omnipotent, in a mundane sense, within the limits of its jurisdiction.

Having thus explained to you the nature of a State, you may very reasonably expect

(*a*) Prov. Juris. Det. I. Lect. VI p. 224.

me to give you some idea of its origin in the records of sociology. In answer to such an assumed expectation on your part let me merely remind you that theories concerning the beginnings of Society, theories contractual, theories intuitional, and theories evolutional, have been exploited ever since the days of Plato, who declared (*a*), what all modern sociological research attests, namely, that political government originated in parental authority, the family being the primordial social unit; and to offer, as an apology for my abstention from troubling you with any hypothesis of my own, the observation that as history demonstrates that no Society ever existed without the rudiments, if no more, of laws and of government, the lawyer, whose business is with the latter, may profitably leave all speculation as to the origin of the former to the domain of the philosopher.

Just let me illustrate, in passing, the difference between an independent or 'simple' State, and that body-politic which although called a State is subject to an extra-territorial

(*a*) Laws, IV, 209.

sovereignty. And I shall use our neighbours to the South as affording sufficient illustrations of both types. The federal republic known as the United States of America is a member of the family of nations because it possesses sovereign power, and is free from control outside of its territorial jurisdiction. The Commonwealth of Massachusetts has no recognition in Public International Law because it has surrendered to the federal State the prerogatives which constitute its complete independence within the family of nations, such as the treaty-making power, the right to raise and equip an army and navy, the right to declare war.

At the time of the outbreak of the American Revolution the United States, though confederated, did not constitute a State because the central government had no direct relations with the people, no power to enforce its decrees, and it was therefore dependent upon the assistance of the several State governments to carry out its policy. But by the constitutional change of 1789 the character of a true State was impressed upon the Union which it has ever since maintained.

The Dominion of Canada has a constitution more favourable to national solidarity than that of the United States of America, seeing that all the unnamed sovereign powers are vested in the federal authority—the very converse of the provisions of the American constitution in regard to undefined political powers ; but of course Canada is not an independent State.

I am sure the practical lawyer, who is above all things opposed to decking out the plain facts of legal science with bizarre costumes from the wardrobe of pure theoretics, will approve my resolve not to leave this part of my subject without recording my opinion of the futility, to say the least, of the attempts of such thinkers as Herbert Spencer, in England (*a*), von Stein and Schäffle in Germany, and Proudhon in France, to treat Society as an actual, living organism. According to the

(*a*) To Hobbes must be given the credit of originating this view in English political philosophy. He says : "By art is created that great Leviathan, called a Common Wealth or State, which is but an artificial man . . . in which Sovereignty is an artificial soul, giving life and motion to the whole body." Leviathan, Introd. i.

ingenious Schäffle (*a*) there is a very close analogy, both physiologically and psychologically, between Society and the human individual. Other German writers have made the comparison still more intimate, and have likened the function of the State in relation to Society to that of the brain in the human body. To appreciate the absurdity of the more general parallel, namely, that between the human being and the State, is to remember that, granting the latter could be treated as a true organism—a biological hypothesis which I stoutly deny, Man is more than an organism. He, if Sir William Hamilton is right, is an *Intelligence served by organs*. And as to the State constituting the brain of Society one has to say that so far from the State doing any thinking for Society, it is the concrete Government (*gubernaculum*, a rudder, the ruling power), that, by delegation, does the thinking for the State.

Concerning this ingenious hypothesis, Professor Maitland, of Cambridge, says (*b*)

(*a*) See his Bau und Leben des Socialen Körpers, passim.
(*b*) Introd. to Gierke's Pol. Theories of Middle Age, xi

"A Sociology, emulous of the physical sciences, discourses of organs and organisms and social tissue," unable "to sever by sharp lines the natural history of the State-group [of existences] from the natural history of other groups."

It is now only necessary for me to explain in a general way what I mean by the Sovereign Power in a State before I enter upon a discussion of the relation of the King to that power, which I trust has not been deferred beyond the demands of perspicuity.

Sovereign power, or sovereignty, as a term in political science, may be defined, shortly, to be *the ultimate coercive power in a State*. In juristic science it is recognized as the foundation upon which rest all the sanctions of positive law. It is neither reposed in nor synergetic with the organ of government, which makes and administers the law, but is behind it. Sovereignty in the abstract resides in the whole body of the people of a State. And that is only another way of putting the famous apothegm of the American Declaration of Independence that: *All governments derive their*

just powers from the consent of the governed (*a*). "La Souveraineté," says Merlin, (*b*), "est la source de toutes les lois; on ne peut donc étudier les lois avec quelque succès, que lorsqu' on se sera fait de justes idées de la Souveraineté dont elles émanent."

With this estimate of sovereignty in your minds you can readily apprehend that the sovereign power and the King are not convertible terms in the constitutional polity of Great Britain and her colonies; nor will you be disposed to scent sedition and disloyalty in my words when I declare that the maxim *Rex non potest peccare* is no sufficient support for the view that His Most Excellent Majesty King Edward the Seventh is impeccable in the eye of the law by reason of "the divinity" that "doth hedge a King," or that he is above the law. And you will be justified in assenting to this view, notwithstanding the *jure divino* apologists of the seventeenth century (*c*) and

(*a*) "Force is always on the side of the governed; the governors have nothing to support them but opinion." Hume: Essays, (1875 ed.) i. pp. 109, 110.

(*b*) Rep. de Juris. 5th ed., tome 31, p. 369.

(*c*) *e.g.* Sir Robert Filmer, (Patriarcha) and Sir Geo. Mackenzie (Jus Regium).

Sir William Blackstone, their successor in the eighteenth century, who fatuously impaired the reputation of his fine commentaries on the Common Law by the advocacy of constitutional views which it is hard to believe he himself thought sound.

If you look upon this utterance of mine as presumptuous, read the Introduction to Prof. Dicey's *Law of the Constitution*, where, after quoting Blackstone's famous apotheosis of the King, he curtly says: "It has but one fault; the statements it contains are the direct opposite of the truth." However, we are not obliged to resort to an exponent of the New Law Learning in order to dissipate this mist of constitutional fallacy; we can find the truth of the matter adequately set forth in the pages of an eighteenth century churchman, namely, by Paley in his *Moral Philosophy*, especially in Book vi, Chapter vii. He tells us there that while theorists have ascribed to the King absolute power and impunity, yet, when one turns to the actual exercise of royal authority in England, he sees those formidable prerogatives dwindle into mere ceremonies.

But I fancy I hear you object: "There must be something more than theory in the question of the impeccany of the King, because it is daily brought home to our business and bosoms. For instance, one can hardly listen to an argument in the Canadian Exchequer Court without hearing the maxim applied in derogation of the doctrine of universal amenability to the law." And I answer your objection in this wise: The maxim manifests its principal activity to-day in actions at law, being chiefly relied on in Crown suits of a civil nature to excuse the Executive from responsibility for the negligence of Departmental officers and servants. But, in order to understand how it came to discharge this function we must take an extensive survey of political history.

The Norman Conquest imposed on England a feudal system which embodied a more absolute type of autocracy than existed at the time in any State in Europe.(*a*) By that system, the fabric of which was built from foundation to

(*a*) See Gneist Hist. Eng. Const. c. viii. (2nd ed. vol. I. p. 118.)

turret of usurpation and force, the King assumed not only the paramount ownership of all the land within his dominions but also the political over-lordship, which recognized no superior. This, of course, was radically different constitutional doctrine from that which the Anglo-Saxons had evolved before the Conquest. In the days of the Heptarchy the supreme sovereignty of the people of the several kingdoms was demonstrated in the fact that the Witenagemot not only claimed but actually practiced the rights to make laws, impose taxes, negotiate treaties, and, *mirabile dictu*, even to elect and depose the King himself (*a*).

Now the Witenagemot was not only the germ of the present British Parliament, but we find in it all the constituent parts of that august body. The King was generally present in person, and at his summons came the prelates, the abbots, the earldormen and the thegns—foreshadowing the House of Lords; on the other hand, the democratic element of Parliament potentially inhered in this ancient

(*a*) Cf. Green's Conquest of England, i. p. 11; Kemble's Saxons, ii. 219.

assembly by reason of every freeman in the land theoretically having the right to attend. We all can recall how our youthful imaginations were fired by the picture drawn in our school-books of the crowd of freemen present at the deliberations of the Witan, signifying their approval of, or dissent from, its decisions by loud shoutings or the clash of arms. Prof. Freeman says (*a*):

"Down at least to the Norman Conquest, the body which claimed to speak in the name of the nation was, at all events in legal theory, the nation itself . . . There was a time when every freeman of England could raise his voice or clash his weapon in the assembly which chose bishops and earldormen and Kings; when he could boast that the laws which he obeyed were laws of his own making, and that the men who bore rule over him were rulers of his own choosing."

And Kemble (*b*) declares that :

"Whether the assembly of the Witan making laws is considered to reprcsent in our

(*a*) Growth of Const. cap. I.
(*b*) Saxons, ii, 239, 240.

modern form an assembly of the whole people, it is clear that the power of self-government is recognized in the latter."

We have well authenticated instances of the deposition of Kings by the Witenagemot, numbering amongst them Ethelwald and Alered, in Northumbria, and Sigebert, Ethelred II. and Harthacnut in Wessex (*a*). As to the people's right of electing the King, I shall speak a little later on.

However, under the absolutism of the Normans we cannot expect to hear much of the theory, still less of the practice, of popular sovereignty as conceived in the polity of the Anglo-Saxons. The popular assembly of the latter gave way to the *Curia Regis*, in its early stages, at least, a mere court of the King's feudal vassals, who, as might be expected, pandered to his despotism ; and thus was the progress of the liberty of the subject retarded for nearly two hundred years. It was not until the effectual blending of the Franco-Norman with the Anglo-Saxon stock that the blossom of Magna Charta appeared on the tree

(*a*) Cf. Taswell-Langmead's Eng. Const. Hist. cap. I.

of British freedom, a magnificent promise of the full fruitage of popular government with which the Empire confronts the issues of the new century.

The late Dr. Rudolf Gneist (*a*), next to Bishop Stubbs the most acute explorer of the constitutional history of England, says :

"The Norman government of the Kingdom rested upon a combination of the relations of military, judicial, police, financial and ecclesiastical authority; consequently its central point was found in the person of the King."

Thus with the advent of the Conqueror, as Professor Edmund Robertson, in his monograph on 'Government' in the *Encyclopædia Britannica*, so well puts it, "Every ancient common right has come to be a right of the Crown, or a right held of the Crown by a vassal."

From this usurpation of the ultimate sovereignty of the State by the Conqueror, and his immediate successors, arose the doctrine of the legal sinlessness of the King and his immunity from the obligations of law, which

(*a*) Const. His. Eng. I. cap. 16 (2nd ed., p. 246).

Blackstone has so erroneously declared to be "an ancient and fundamental maxim." After examining with much care the sources of history which have been revealed since the time when Blackstone wrote, I am persuaded that the doctrine, contrary as it is to the most ancient theory of English constitutional law, had its origin in procedure rather than in substantive law; in fact manifesting itself first in the anomaly which the old pleaders professed to see in the King commanding himself, by process issued in his own name, to appear and submit to judgment pronounced by himself in one of his own courts. That, however, was an idea not evolved until over two hundred years after the Conquest, as will be shown hereafter; but when it did appear it was eagerly seized upon by ecclesiastical advocates of the celestial authority of Kingship, conjointly with certain sycophantic jurists of the times of Tudor and Stuart absolutism, and by them palmed off as being of the very pith and marrow of the British Constitution.

Had the immunity of the King from actions at law been always recognized in

history, the advocates of the doctrine of his inherent supremacy over the law would have had much more countenance. But unfortunately for them the record is the other way. The very phraseology of the Coronation oath bespeaks potential naughtiness on the affiant's part, for it requires him to swear to govern (not *his* people, mark you!) "the people of the United Kingdom of Great Britain and Ireland and the Dominions thereunto belonging, according to the statutes in Parliament *agreed on*, and the respective laws and customs of the same." But I have something much more conclusive of the question than this for your consideration.

In the report of a case determined in the year 1351 (the twenty-fourth of the reign of King Edward III.) (*a*) Wilby, C.J. of the Common Pleas, declared he had seen a writ thus framed : *Praecipe Henrico Regi Angliae* &c.,—"in lieu whereof," he says, "is now given petition by the prerogative." Wilby's statement has been severely criticized by Brooke, C.J., in his *Abridgement*, tit. 'Petition'

(*a*) Y. B. 24 Edw. III. 55b.

12, and tit. 'Prerog.' 2 (d), and by Erle, C.J., in the comparatively recent case of *Tobin* v. *The Queen* (*a*). But such criticism entirely overlooks other ancient authorities quoted by Mr. Horwood, the translator and editor of certain of the Year Books, who says (*b*):

"The ordinance of the Council and of the twelve chosen by the Commons made in the year 1258, and confirmed by Henry III. in the following year, seems plainly to give the subject the right to sue by writ against the King (see Rymer's "*Foedera*," i. 381, ed. 1816); and it may have been one of the writs issued after this provision that Wilby saw."

Bishop Stubbs (*c*) thinks that Chief Justice Wilby's statement has much corroboration in the older reports of cases; and Mr. Alfred Cutbill in a valuable essay on Petition of Right (*d*) seemingly adopts the authorities cited by Mr. Horwood as substantiating that up to the time of Edward I. the subject's right to sue the King by writ was undoubted,

(*a*) 16 C. B. N. S. 356.
(*b*) Y. B. 33 & 35 Edw. I., Preface, xv.
(*c*) Const. Hist. Eng. ii., p. 250 (3rd ed.).
(*d*) Pp. 8 and 9.

but that in this reign petition of right was declared to be the only remedy against him, not by any Aet of Parliament, but by a mere ordinanee of the King himself.

As this 'mere ordinanee of the King' harmonized with the theory of the attorneys of that day that the King ought not to command himself, my own view of the matter is that they were able, by appealing to the material interests of their elients, to stifle the protesting voiee of popular rights. "Humour the King in his royal whim," one might faney them saying, "and your elaim will be allowed. Take a writ against him, and you may lose it in litigation." Certain it is, that the remedy by petition shortly after beeame the only method used for obtaining redress for the wrongs done by the impeecable King, but it must be remembered that there is no enaetment of the English Parliament depriving the subjeet of any remedy he may have aneiently exercised. The Aet 23 & 24 Viet. e. 34, does not do so, it being limited to amending the *procedure* on petitions of right (*a*).

(*a*) See Clode on Pet. of Right, p. 157.

Before leaving this subject, I must not omit to mention the important fact that in Prynne's *Plea for the Lords* (*a*) the Patent Rolls of 43 Hen. III. are cited as giving power to every man injured to "freely sue against, or arrest the King."

After all said and done there is practically little difference between the modern Petition of Right and a Writ of Summons, so far as getting the King into court is concerned; for the constitutional rule is that the Executive should never capriciously withhold a fiat for a petition to be filed in the courts. (*b*). So it would appear that the history of this matter of procedure unfolds but a weak foundation for the theory of the legal sinlessness of the King.

On the other hand, when we turn to the repositories of the law of the Constitution we find that they are almost unanimous in maintaining that the King is subject to the law of the land. Furthermore, English con-

(*a*) P. 97.
(*b*) Clode on Pet. of Right, 166. Cf. Allen, Roy. Prerog. p. 94; and Cutbill, Pet. Right, pp. 14, 24.

stitutional history repeatedly shows that the people have not scrupled on great occasions to assert their sovereignty over the person of the King. I have already given instances where the Witenagemot deposed him, and shall supplement them with instances where the people exercised the same, and also cognate powers, later on in history. Suffice to say here that both constitutional theory and practice show very conclusively that the paramount sovereignty of the people is, and has ever been, the true genius of English political institutions.

Taking up the threads of constitutional theory, we find that even before the Revolution of 1688 they might have been woven into a web of argument through which the most subtle advocate for absolutism could not break.

"The further back we carry our researches," says Allen in his intrepid *Inquiry into the Rise and Growth of the Royal Prerogative in England* (a), "the stronger is the evidence we discover that, however the monarchical theory may have been proclaimed in law-books and

(a) P. 10.

magnified by Churchmen, it was never reduced, strictly and completely, to practice; nor was it ever recognized or quietly submitted to by the people as the Government handed down to them by their ancestors."

Now we have it on the authority of Tacitus (*a*) that the primitive political constitutions of the Germans, the ancestors of the Anglo-Saxons, were essentially democratic, hence the assertion of ultimate sovereignty by the Witenagemot, as I have before pointed out. Says Professor Freeman (*b*) :

"In the Germany of Tacitus, as at this day in the democratic Cantons, the sovereign power is vested in the whole people, acting directly in their own persons."

I have already shown how the people in the time of the Heptarchy did not lack courage to assert their sovereign right to depose Kings who failed to rule in conformity with the law. The correlative right of electing the King was also claimed and exercised by the Witenagemot. Undoubtedly there was a royal

(*a*) De Mor. Germaniae, cap. 7-13.
(*b*) Growth of Eng. Const. cap. i.

family in each of the several kingdoms of the Heptarchy, but they had no vested right to the throne. The Crown was then an office, and not a piece of inheritable property as it afterwards became. Among the members of this particular family the Witenagemot had the right of free choice, and usually they confined their selection to it. Thus Ethelred I, in 866, was chosen in preference to the issue of his elder brother. In 946, Edwy, son of Edmund, was at first ignored and his uncle Edred elected to the throne; but, on the latter's death, Edwy became King by the choice of the people. Ethelred II after having been deposed in 1013, was restored the following year. In 1066, however, the royal family was overlooked altogether, and Earl Harold, the greatest Saxon statesman after Alfred, was elected King (*a*).

And so history establishes beyond cavil that the Saxon Kings were subject to the sovereignty of the people.

Now when we come to the Conquest there

(*a*) Cf. Allen's Royal Prerog. p. 44; Taswell-Langmead's Eng. Con. Hist. cap. 1.

is one important fact, apt, indeed, to be obscured by the despotic character of his conduct as soon as he felt himself securely on the throne, namely, that William of Normandy, at his own request, was formally elected King by the Witan ; and, moreover, as I have pointed out before, swore by the ancient Coronation Oath to govern the Kingdom in conformity with the laws then existing. It seems to me that this fact throws a great deal of illumination over the post-Conquest deposition of Kings by the English people, as well as over the last instance of the assertion of their ancient sovereign right to elect a King, namely, in 1689.

The first King to be deposed after the Conquest was Edward II. He was formally deposed by the Parliament which assembled at Westminster, in January 1327, because, in the opinion of Parliament, he had broken the Coronation Oath, "had ruined his Kingdom and people, and had suffered himself to be led in all things by evil counsellors." Clearly, then, Edward II was not impeccable. Possibly the mind of Parliament at that time was

supported by what Bracton, whose book on the Laws of England is called "the crown and flower of English medieval jurisprudence", (*a*) wrote nearly a century before : "The King has as superiors (1) God, (2) the law, and (3) his court ; for the earls are the King's *comites*, and he who has a *socius* has a master" (*b*). Fleta has something to the same effect (*c*).

Just here I shall briefly refer to Dr. Gierke's recently translated scholarly work on *Political Theories of the Middle Age*. At pp. 39 40, he says that it was the well-recognized theory of the European jurists in the twelfth century that "the legal title to all Rulership lies in the voluntary and contractual submission of the *Ruled*". This, it seems to me, is a very remarkable anticipation of the apothegm I have already quoted from the American Declaration of Independence.

(*a*) Pollock & Maitland's Hist. Eng. Law, i, 206 (2nd ed.)

(*b*) See De Leg. Ang. f 34b. It is claimed that Bracton did not write this passage; but even if spurious it was extant at the time we speak of. Cf. Maitland's Introduction to Bracton's Note Book p. 33.

(*c*) L. i. c. 17 § 9.

The next great and salient instance where the sovereignty of the people constrained the King, was the case of John, of infamous memory. True, John was deposed by the Pope rather than by the English Parliament, and it is also true that the Great Charter was wrung from the pusillanimous King by the people under arms ; but the Charter was a triumphant vindication of the amenability of the King to the law. Speaking of the Great Charter during the hey-day of Stuart absolutism, Sir Edward Coke said in Parliament :

"Sovereign power is no parliamentary word. Magna Charta and all our statutes are absolute, without any saving of sovereign power. Take we heed what we yield unto! *Magna Charta is such a fellow that he will have no sovereign.*"

By such stout views, expressed at this critical period of our constitutional growth,

> " the ambrosial curls
> Upon the Sovereign One's immortal head
> Were shaken."

Then we come to a most notable occasion in history, when, for the first time after Parlia-

ment had assumed its settled form and character, the whole executive government was taken from the King (*a*), he being ultimately deposed. I speak of the case of Richard II. You remember the story. After repeated quarrels with the Parliament over his tyrannical conduct, his partiality for favourites, such as had been the undoing of Edward II, and his determined policy to subvert the fundamental laws of the land, Parliament declared that it had become "lawful for his people, by their full and free assent and consent, to depose the King from his royal throne, and in his stead to raise up some other of the royal race upon the same."

Taswell-Langmead says : (*b*)

"Although Richard was induced to resign the Crown, and Henry of Lancaster laid claim to it, the deposition, the vacancy of the throne, and the subsequent election of Henry, are each recorded in the most distinct terms in the official entry on the rolls of Parliament."

(*a*) See Hallam's Mid. Ages, iii, 59.
(*b*) Eng. Cons. Hist. cap. viii.

And so passed away the claim of Richard II to legal and political sinlessness.

If you ask me why I pass over the case of Charles I, it is not because I regard that unfortunate monarch as a martyr, but because I look upon those who imbrued their hands in his blood as guilty of regicide. "The indictment, the nomination of a judicial commission, the condemnation and execution of the King," says so impartial an authority as Gneist,(*a*) "is the gravest act of violence in the whole of English constitutional history—an act which can only occur once in the history of a European nation."

With history to countenance them, the Convention Parliament of 1688-9 had no hesitation in declaring that James II "had broken the original contract between King and people" by violating the fundamental laws and abdicating the Government; nor did they fail to follow up such declaration with a pronouncement that the throne had thereby become vacant. I shall not weary you with a review of the facts of this momentous event

(*a*) Const. Hist. of Eng. 2nd ed. ii, p. 255.

in our constitutional history, beeause I am sure Macaulay's glowing recital of them has not yet failed to irradiate your memories. Suffice it for me to avow the firm conviction that, while the Revolution of 1688 apparently resulted in a mere transfer of the executive supremacy of the realm of England from a monarch deposed to a monarch newly chosen, it was in reality a formal and final resumption by the people, through their representatives in the Convention Parliament, of their ancient heritage, the whole and entire supreme power in the State. The Declaration of Right may be said to have been the symbol of a constitutional 'reversion to type'—to use the language of Biology—a getting back, so to speak, from the pseudo-genus of Norman, Tudor and Stuart times to the true genus of the Anglo-Saxon epoch. From that time forward Lincoln's famous characterization of true popular sovereignty : "Government of the people, by the people, for the people," is practically, although not theoretically, as applicable to the body-politic of modern England as it is to that of the United States of America.

Now, with all deference to the contrary opinion of some great political thinkers, I would submit with some confidence that the Revolution of 1688 did not, as they maintain, witness a delegation by the People to the House of Commons "of the supreme power in the State" (*a*). It is true that, as a result of the Revolution, the executive power of the Crown, as I have before pointed out, has become vested in the Cabinet, but that is not the supreme power. The present position of the Cabinet was never better described than in the querulous remark of George II—"Ministers are the King in this Country" (*b*). As the King lacked the ultimate sovereignty of the realm so do the Ministers lack it now. It is Parliament, in its three parts, that wields the supreme power in the State, by the delegation and authorization of the people, impliedly given or granted Never has this great constitutional truth been more correctly stated than by Sir Thomas Smith in his *Com-*

(*a*) Cf. J. R. Green's Short Hist. of Eng. People, p. 680.

(*b*) See Lord Mahon's Hist. of Eng. iii, 280.

monwealth of England (*a*), published a century before the Revolution :

"The most high and absolute power of the realm of England consisteth in the Parliament. . . . All that ever the people of Rome might do either in *Centuriatis comitiis* or *tributis*, the same may be done by the Parliament of England. . . . For every Englishman is intended to be there present either in person or by procuration and attorney, of what pre-eminence, state, dignity or quality soever he be, from the prince (be he King or Queen) to the lowest person of England. *And the consent of the Parliament is taken to be every man's consent.*"

And I may say, by the way, that in the theory that every man is present in Parliament, either in person or by representative, lies the reason of that apparently hard maxim: "Ignorance of the law excuses no one"; in other words, that a man shall not excuse his wrong-doing by pleading ignorance of the law. It is apparent to the meanest intelligence that

(*a*) Book ii, cap. 2.

that the law-maker cannot well be a law-breaker *propter ignorantiam*.

"Here", says Sir Frederick Pollock (*a*), referring to the above quotation from Smith's *Commonwealth*, "we have the first exposition by any English writer, if not by any European one, of the notion of sovereignty in its modern amplitude." And Sir Frederick proceeds to show the fallacy of claiming supremacy for the House of Commons simply because it can prevent government from being carried on in opposition to its will. The House of Commons cannot legislate by itself, and its ability to mould legislation by forcing its wishes upon the other constituent parts of Parliament is a matter of practical politics rather than of sovereignty.

Father Time has ever manifested a relish for irony, and the records of English constitutional history are not without their laughable side. Who can fail to appreciate, for instance, the magnificent humour of the situation when George III, a hundred years and more after the passage of the Bill of Rights,

(*a*) First Book of Jurisprudence, cap. iii, Part 2.

dismissed the Duke of Norfolk from the Lord-Lieutenancy of the West Riding of Yorkshire because at a certain dinner of the Whig Club he gave as a toast: "Our Sovereign—the People"! Charles James Fox repeated His Grace's offence, and was dropped from the Privy Council. The latter episode is chiefly memorable to show the dislike that George III, the last of our monarchs to entertain the delusion that Englishmen might be ruled otherwise than according to their will, ever manifested toward Fox. In illustration of this dislike, Lord Townshend said that when Fox kissed the King's hand on becoming one of the coalition Ministry of 1783, His Majesty "turned back his ears and eyes, just like the horse at Astley's when the tailor he had determined to throw was getting on him." History also records many other instances of this unfortunate monarch's chafing under the bit of popular sovereignty, among them the following: Expressing himself in the presence of Lord Chancellor Thurlow to the effect that he would rather retire to Hanover than accept Ministers or measures of which he disapproved, the grim

lawyer pithily replied : "Your Majesty may go ; nothing is more easy ; but you may not find it so easy to return when your Majesty becomes tired of staying there" (*a*).

Although George III, until his reason failed him, zealously sought to bring the independent Kingship out of the study of the *jure divino* doctrinaire into the practical domain of State affairs, it may be said that it disappeared from our political history when his son and successor, George IV, after much perturbation of soul and many overt struggles against the unswerving march of progress of British freedom, consented to the policy of his Ministers in introducing a Bill for Roman Catholic Emancipation in 1829 (*b*). There have, indeed, since then been one or two shadowy and fleeting reappearances of this constitutional phantasm upon the stage of history, but they only serve to remind us of the royal apparition in *Hamlet*—

"So like the King that was ;"

(*a*) See May's Eng. Const. Hist. vol. 1, 64.
(*b*) Gladstone : Gleanings, i, 38, 78.

and prompt us to ask of it—

> "Why the sepulchre,
> Wherein we saw thee quietly inurn'd,
> Hath oped his ponderous and marble jaws
> To cast thee up again ?"

Listen to some thought-compelling remarks on the present relative positions of Crown and People by a Cambridge Professor, to whom I have already referred in this paper, and of whom I have come to hold the opinion that as an exponent of legal history he has few equals among his contemporaries. I speak of Professor Maitland. He says : (*a*)

"In the course of the eighteenth century it became a parliamentary commonplace that 'all political power is a trust'; and this is now so common a commonplace that we seldom think over it. But it was useful. Applied to the Kingly power it gently relaxed that royal chord in our polity which had been racked to the snapping point by Divine Right and State religion. Much easier and much more English was it to make the King

(*a*) Introduction to Gierke's Political Theories of the Middle Age, p. xxxvi.

a trustee for his people, than to call him officer, official, functionary or even first magistrate . . . Much has happened within and behind that thought of the King's trusteeship; even a civil death of 'personal government,' an euthanasia of monarchy. And now, in the year 1900, the banished Commonwealth, purged of regicidal guilt, comes back to us from Australia, and is inlawed by Act of Parliament."

And here is the voice of the very latest witness I can summon to my support:

"After long wanderings through many fields of speculation, as well as many a hard-fought fight, all civilized nations have come back to the point from which the Romans started twenty centuries ago. All hold, as did the Romans, that sovereign power comes in the last resort from the people, and that whoever exercises it in a State, exercises it by delegation from the people." (*a*)

With these quotations I feel that I may very safely rest the case for *The Sovereign*

(*a*) Bryce: Studies in History and Jurisprudence, ii, p. 110.

People of Great Britain v. *His Majesty the King.*

I trust I am not presumptuous when I venture to think that the authorities I have marshalled support to a very satisfactory degree the thesis advanced in this paper, which may be recapitulated as follows, namely: That the maxim that 'the King can do no wrong' is a constitutional dogma entirely out of harmony with the genius of free institutions within the British Empire; that the history of England shows that in all political crises the maxim has been 'more honour'd in the breach than the observance'; and, lastly, that it is a 'fond thing, vainly invented' by the mediæval attorneys, presumably to further the interests of their clients with the King. Yet, notwithstanding the evidence I have given you that the King is not superior to the law, that he is not incapable of doing legal wrong, and that he may be deposed from his office by the will of the people, the 7th edition of Broom's *Legal Maxims*, published in the year 1900 (*a*) calmly tells us that "the principle attributes

(*a*) Cap. ii, p. 33.

of the Crown are sovereignty or pre-eminence, perfection, and perpetuity ; and these attributes are attached to the wearer of the Crown by the Constitution, and may be said to form his constitutional character and royal dignity."

Alas, the evil done by those old attorneys does indeed live after them !

"The ideal King of the lawyers," says Allen (*a*), "is a King above the law ; the real King of the Constitution is a King subject to the law."

Walter Bagehot, in his unique work on the Constitution, says : (*b*)

"If any one will run over the pages of Comyn's Digest, or any other such book, title 'Prerogative,' he will find the Queen has a hundred powers which waver between reality and desuetude, and which would cause a protracted and very interesting legal argument if she tried to exercise them. Some good lawyer ought to write a careful book to say which of these powers are really

(*a*) Inquiry into Prerog., etc., p. 34.
(*b*) The Eng. Const., pp. 58, 59 (5th ed.).

usable, and which are obsolete. There is no authentic explicit information as to what the Queen can do, any more than what she does."

To quote for the last time from Professor Freeman (*a*):

"The whole ideal conception of the Sovereign as one, personally at least, above the law, as one personally irresponsible and incapable of doing wrong . . . is purely a lawyer's conception, and rests upon no ground whatever in the records of our early history."

Now I fancy that by reason of what I have said and quoted here, the suspicion of a smile at the expense of the integrity and good judgment of the Bar will beset the countenances of those who have not the honour of belonging to that profession. Be it so. It is to the credit of the profession that they can stand well-founded criticism of this sort without any sense of shock or dismay. Unlike the ideal King of their seventeenth century doctrine, it is possible for them to make mistakes. But, on the other hand, those mistakes are few, and

(*a*) Growth of Eng Const., cap. iii.

they are not ashamed to correct them upon conviction of error. The master masons of the splendid structure of English Jurisprudence are not going to be dismissed as unworthy servants of their country because, in a moment of weakness, they builded one of the more ornamental parts of the edifice a little worse than they knew.

I have not been careful to explain that my observations on the royal prerogative are just as applicable to the body-politic in Canada as to that of the mother-country, because that the prerogatives of the Crown, so far as they intersect the domain of colonial legislative powers, are as amenable to parliamentary control here as they are in England, is a matter of which every political student is cognizant. But our forefathers did not obtain the proud measure of constitutional liberty that lies behind that declaration without a series of conflicts which searched the very marrow of the stuff whereof they were made. Only in the travail of great souls may civil liberty be born. In Nova Scotia and New Brunswick we repeated, in miniature, the post-Conquest his-

tory of constitution-building in England, starting with a sort of *Curia Regis*, represented by an autocratic Governor and his Council, and ending with a form of representative government which bears upon it the impress of the truest freedom. In Prince Edward Island the attainment of a similiar boon was complicated and retarded by a system of landlordism which reproduced some of the worst features of feudal tenures in the middle ages. In the two Canadas it was in the dispensation of Providence that civil war should lay its baleful shadow over the land before the people would be privileged to greet the coming of free political institutions in the train of 'white-robed Peace'. And so in these detached provinces were laid the foundation-stones of constitutional liberty and self-reliance upon which the great Dominion was thereafter to be built by the genius of native statesmen. Was not their conception of a federal State the best possible cement to unite these segregated political crystals? And may I not also ask if the world has seen much better nation-building than theirs, and that, too, in the face of

obstacles which to the mind of the speculative publicist seemed wholly insurmountable ?

And so I am brought to conclude the examination of my theme with the observation that inasmuch as the executive power of government is now in the hands of the Cabinet, the Prime Ministers of Great Britain and her self-governing colonies have more concern with the maxim *Rex non potest peccare* than His Most Excellent Majesty, King Edward the Seventh. Indeed, if it were permitted to one to be curt in his expressions touching so august a matter, he might be tempted to aver that to-day the King is impeccable for the very simple reason that he has no power to do wrong.

It remains to be said that the Executive can do no wrong, because, in their sphere, they represent the Sovereign People. (*a*)

What then ? Shall we say that as the English people have come round again to their old-time way of democratic thinking, we no longer ought to retain the fiction of Kingship?

(*a*) This principle is recognized in the American theory of Government. See opinion of Gray, J. in Briggs v. Light Boats, 11 Allen at p. 162.

God forbid! We must not forget that we had Kings in the days of our purest democracy. A hereditary King, with the checks and restraints that hedge him about under the modernized Constitution, is the very best sort of a President that our 'veiled republic' can possibly have. We thus escape all the exacerbations of periodical elections; and, on the other hand, we have the advantage of the holder of the office always knowing his place—an inestimable quality, for then we miss all those crude impolicies which usually characterize the novitiate of the holder of an elective office. Then, again, there is the consideration, not as trifling as it would on the surface appear, that with a hereditary aristocracy still in the vigour of its prime like that of England, it would be an anomalous and unfortunate thing for the chiefest and most picturesque figure in the social life of the nation to be constantly changing its personality.

No, beyond a doubt the time has not arrived for a serious modification of our Constitution touching its manifest head. Nor need we citizens of this young Dominion be

fearful of any fierce revolutionary upheaval in the future, should the interest of the British people as a whole demand such modification. We have only to remember that history unfolds a splendid record of the self-control and discretion of our race under the strain of constitutional crises. Nor do we, who stand upon the threshold of a vaster enterprise in empire-building than the Past has witnessed, lack counsels of hope and guidance.

"Consider," says Milton, "consider what nation it is whereof ye are: . . . a nation not slow and dull, but of a quick, ingenious, and piercing spirit; acute to invent, subtile and sinewy to discourse; not beneath the reach of any point that human capacity can soar to."

And then he continues in these magnificent words, which may well stand as the literary embodiment of a prophetic vision of the Greater Britain—the true Commonwealth of Freemen—which this century seems likely to create:

"Methinks I see in my mind a noble and puissant nation rousing herself like a strong man after sleep, and shaking her invincible locks; methinks I see her as an eagle, mewing her mighty youth and kindling her undazzled eyes at the full midday beam; purging and unscaling her long-abused sight at the fountain itself of heavenly radiance; while the whole noise of timorous and flocking birds, with those also that love the twilight, flutter about, amazed at what she means."

It is popular sovereignty, as it was conceived by the framers of the English Constitution, that will make the realization of such a vision possible—

"Nought shall make us rue
If England to itself do rest but true !"

MODUS ET CONVENTIO VINCUNT LEGEM.

IT is proper at the outset to endeavour to understand the exact meaning of this important maxim of the law.

Taken in the strictest sense of the words used, when translated into English, it expresses a proposition essentially different from that which it is intended to affirm. The student of English law would make a very serious mistake if he accepted its meaning as that stated by Broom in the ninth chapter of his *Selection of Legal Maxims*, viz., that "the form of agreement and the convention of the parties overrule the law" (*a*). Still less does it establish the possibly more alarming rule evolved from it jauntily by Wharton (Max. XLVIII) *i.e.* "Custom and agreement overrule law" (*b*), although the honours of translation may fairly be divided between the two commentators.

(*a*) Dr. Broom's own excursus on the maxim shows this interpretation to be misleading.

(*b*) On the contrary, custom may make the law but not *overrule* it.

A more correct rendering of the principle which the maxim seeks to embody is given by Ulpian : "Contractus legem ex conventione accipiunt" (*a*). But, taking the maxim as couched in its familiar phraseology, it is quite obvious that a great deal of difficulty would be avoided if the word 'vincunt' were translated 'secure' or 'establish', as it properly may. In no sense is it true that citizens may overrule the law of the State by their private agreements,—"Privatorum conventio juri publico non derogat" (*b*). But it is possible for the parties to a contract to *secure*, under certain restrictions, legal relations between each other which are unique and peculiar—in other words, they *establish* a 'conventional law' for themselves.

The restrictions or limitations upon their contractual freedom in this behalf may be generally stated to be, first : That the parties cannot agree to anything in violation of any express law ; and secondly : That the inter-

(*a*) Dig. xvi., 3. fr. 1, § 6, and see Puffendorf, De Jure &c., v., c. x., § 5, n. 1.
(*b*) Dig. 50, 17, 45.

ests of the public, or of third persons, must not be prejudiced by the execution of the contract.

Then, the meaning of the maxim may not be more broadly stated than this, viz.: *That where no rules of law, or principles of public policy, or rights of others are invaded, the parties to a contract may thereby make a private law for themselves* (*a*).

It is difficult to say just when the maxim under consideration came into use in its exact current phraseology ; but its principle can be traced back clearly enough to the *Corpus Juris*. In the *Digest* (*b*) we have Ulpian's dictum : "Contractus legem ex conventione accipiunt" —which simply means that what the parties have agreed to is the law of their contract. But by reference to Lib. II, Tit. XIV, 28, we find that this freedom of contract is restricted in these words : "Contra juris civilis regulas pacta conventa rata non habentur." Again, in Lib. L., Tit. XVII, 45, we meet with much the same sort of a limitation, purporting to be

---

(*a*) See *Kneettle* v. *Newcomb*, 22 N.Y. at p. 252 ; and Dig. i, 15, 3.

(*b*) Dig. xvi, 3, fr. 1, § 6.

derived from Ulpian's *Ad Edictum*, viz.: "Privatorum conventio juri publico non derogat."

In the *Codex*, 2, 3, 6, contractual freedom is restricted in this wise :—"Pacta quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est." (*a*).

The principle was also crystallized into a *regula* of the Canon Law. In a work entitled : *Les Regles du Droit Canon* (*b*), we find the following rule : "*Contractus ex conventione legem accipere dignoscuntur*". Dantoine thus freely translates the rule into French : "On doit juger de la qualité d'un contract par les conventions qu'il contient, et qui sont autant de loix entre les parties."

In the course of his commentary on this principle in the law of contract, Dantoine says: (p. 465) "C'est d'Ulpien que l'on a tiré cette Règle. Ce jurisconsulte s'en explique précisément en ces termes : *Contractus ex conven-*

(*a*) And see Codex 2, 3, 29.

(*b*) By J. B. Dantoine, LL.D., published at Lyons in 1720, p. 465.

tione legem accipiunt. (Leg. I. § 6 ff. de positi vel contra). Et il dit ailleurs que l'on doit exécuter fidèlement tout ce qui est arrêté entre les parties dans un contract, parce que toutes les conventions qui le composent sont autant de loix entre ceux qui contractent. *Hoc servabitur quod initio convenit, legem enim contractus dedit* (Leg. 23 ff. de regul. jur.)" At p. 467 he continues: "Mais nulle convention ne peut devenir une loy entre les parties qu'autant qu'elle est conforme à la justice et à la raison. C'est pourquoy tout ce qui est contraire aux bonnes mœurs, tout ce qui contient quelque turpitude, enfin tout ce qui est impossible de fait ou de droit, tout cela demeure inutile et sans effet. *Omnis conventio de re turpi et contra bonos mores facta, vel impossibilis de jure aut facto, reprobatur, et nullius est momenti.* Et pour me servir de l'expression des Empereurs Sévère et Antonin — *Pactaque contra leges, constitutiones, vel contra bonos mores fiunt, nullam vim habere imdubitati juris est.* Ainsi tout pacte est nul non seulement lorsque l'on a stipulé une chose illicite, mais encore quand il

donne occasion au mal. Comme si l'on étoit convenu entre associez que l'on ne seroit nullement responsable de la perte des fonds et des effets de quelque cause qu'elle pût provenir : Si une pareille clause étoit valable, elle donneroit lieu à celuy qui seroit mal intentionné de pratiquer le dol et la fraude pour s'enrichir aux dépends de la société, ce que l'on ne doit point permettre". Most of which, it is hardly necessary to point out, entirely harmonizes with the modern English law of Contract. Our law, however, does not admit of a person escaping from the obligations of his contract by simply demonstrating, by means of a syllogism, that what he has engaged to do is unreasonable.

We have not been able to trace the maxim in its present terms to an earlier source than Bracton (*De Leg. Angl.*) and *Fleta* (*a*). In the third book of the later commentary, entitled *De Donatione Conditionali*, there is the following embodiment of the maxim: "*Modus enim*

(*a*) Circa 1290. See a critical arraignment of the value of this work in Pollock & Maitland's Hist. Eng. Law, vol. 1, p. 210 (2nd ed.)

legem dat donationi, et tenendus est etiam contra jus commune, quia modus et conventio vincunt legem" &c. This passage is inaccurately quoted in Coke's *Littleton*, vol. I, at p. 19a.

This closely follows Bracton (*a*) who says: "*Modus enim legem dat donationi, et modus tenendus est contra jus commune, et contra legem, quia modus et conventio vincunt legem.*" Before Bracton and Fleta the maxim was adumbrated in the *Leges Henrici Primi* and in Glanvill's *Tractatus*. In the former (c. 49) we read: "Pactum enim legem vincit"; and in the latter (x, c. xiv): "Conventio legem vincit."

In another passage, (*b*) Bracton enlarges upon the principle thus: "Item quia conventiones, conditiones et pacta et modi diversi donationum incidunt in donationibus, si in- continenti [illegible]r, legem dant donationi et donatior [illegible]nt, et dant exceptionem donatori, et ligant personas contrahentium et obligant ipsam rem datam, et transeunt cum

(*a*) De Leg., etc., Angl., f. 17 b.
(*b*) Ibid., f. 16 b

ipsa re de persona in personam." Sir Travers Twiss, in his edition of Bracton, (Vol. I, p. 129) translates this passage as follows : "Likewise, because conventions, conditions, and pacts, and different modes of donations, are incident to donations, if they are forthwith applied, they impose a law upon the donation, and they invalidate the donation and raise an exception to the donor, and bind the persons who contract, and oblige the thing itself given, and pass with the thing itself from person to person."

Treating of the old law of covenants, in Chap. VII, p. 164, of Sheppard's *Touchstone*. the author lays down this proposition : "If a lessor covenant with his lessee that he shall and may have houseboot, hayboot, plowboot, etc., by the assignment of the bailiff of the lessor, this is a good covenant : and yet it seems it doth not restrain the power that the lessee hath by the law to take these things without assignment. But if the lessee do covenant that he will not cut any timber, or fuel, without the leave, or without the assignment of the lessor, this is a good covenant and

doth restrain him ; for in this and such like cases the rule is *Modus et conventio vincunt legem.*" The *Touchstone* was, however, written somewhere about the beginning of the reign of Charles I ; and so Coke's reference to the maxim in 2 *Reports* 73 b. is almost contemporaneous. The passage last referred to is as follows : "It is commonly said *modus et conventio vincunt legem* ; and the covenant and agreement of the parties hath power to raise an use, &c."

In *Butt's Case* (*a*), Sir Edward Coke applies the Civil Law limitation upon the freedom of contract, before mentioned, to the Common Law in this wise : "Pacta privata non derogant juri communi."

These appear to be the only authorities which throw any light upon the origin and meaning of the maxim in English law ; and they establish that it is nothing more than a principle of the Roman law in an altered and more uncouth dress. In the case of this and many other maxims stolen from the Justinian

---

(*a*) 7 Co. 23b.

treasure-house by the builders of English law, the syntactical disguise used by the plunderers has only resulted in obscuring the meaning of the principle as it stood in the original.

ON THE NOBILITY OF THE LAW.

A Fantasy.

I NEVER remember so fine a Christmas-eve as that of 189—. The weather was ideal. The streets were carpeted with snow of the samite-like texture characteristic of early winter. The full moon was riding in a cloudless sky; while the keen, dry air was so surcharged with exhilarating properties that one wanted to cry aloud for the very joy of it. Nature at large was fully alive to the responsibilities of the season, and, as a lonely and ruminative bachelor, I found it interesting after dinner to watch, from the Club window, the various manifestations by my fellow-men of how absolutely they were swayed by the beneficent influences abroad in the land.

Just as the throng of merry passers-by was beginning to diminish, and I was awakening to a sense of my solitariness, a voice broke in upon my reveries, with: "Who is that in the window? O it's you, Willoughby!" And then

the voice proceeded, in ironical tones, to recite:

> "A lawyer art thou?—draw not nigh!
> Go, carry to some fitter place
> The keenness of that practised eye,
> The hardness of that sallow face!"

"O, indeed," continued the voice, which I now knew to be that of my loquacious friend Tredgold, "I am not slandering you at all! What have you lawyers to do with the celebration of *any* Christian festival, much less that of Christmas, which calls for the exercise of virtues which all of you smother when you don your black gowns. You remember who it was who said: 'Woe unto you lawyers!'"

"Tredgold," I replied, "you are a fool; but I shall not answer you according to your folly. To meet with any man in these advanced days who thinks that the denunciation you have just quoted had reference to any but the expounders of the Mosaic law is enough to freeze one into silence!"

A couple of my acquaintances who had just entered the room laughed at this, and Tredgold said: "Ah, well, old man, don't get excited over it! Come and have a glass of wine

with us; and if you don't want us to regard you as indulging in the symbolism of Christmas-eve love and good-will by so doing, why pour a libation to whatever deity you lawyers affect in the pagan pantheon! '*Chacun à son goût*,' you know; that's my motto!"

Disdaining further reply to Tredgold's banter, I joined his little group around the table, and drank the Christmas cup with all the formalities peculiar to the Club. Thereafter I played my usual rubber of whist, which was finished just as the clock struck eleven, when some one who lived in the direction of my lodgings asked me if I were going along, and I left the Club with him. During the walk homeward my companion, who was an intelligent man of the world, referred to Tredgold's chaff at the expense of my profession, and remarked how singular it is that in these days of enlightenment the old-time prejudice against the moral standards of the law is still so widespread. "People seem to think, now," he said, "that lawyers are *un*necessary evils!"

I suppose it was the genius of the season rather more than anything else that caused me

to ponder over the subject after I had bidden my companion a 'Merry Christmas,' and turned into my lodgings. But certain it is that when I had thrown fresh coal upon the fire, lighted my pipe, and ensconced myself in my favourite chair, I found my mind busy, to the exclusion of everything else, in exploiting a question which I fondly imagined I had solved to the satisfaction of my conscience some time during the first year of my service as an articled clerk, namely, "*Is the Law a great and ennobling profession?*" Many a time before that I had wondered whether it really had a *raison d'être* in the social and moral needs of mankind, or if it were not merely an organized medium for the furtherance of oppression, deceit and all uncharitableness.

Now, oddly enough, I have always found the coals of my grate fire most helpful to me in reaching a right conclusion in matters of difficulty—my mind, by some process that I could not begin to explain, induing their sensuous elements of form and colour with certain logical values, which give me the cognition of truth or untruth just as effectively as

the physical state of the coals demonstrate to me that the fire is either alive or dead. But to-night the coals seemed to have lost their magical powers; and, for what appeared to me a long time, I saw nothing upon the glowing surface of the fire but the question that was troubling me: *Is the Law a great and ennobling profession?* Presently, however, I became sensible of a strange and delightful odour pervading the room; and gradually I saw the inscription on the coals fade away with the flame itself, while the fire-place slowly increased in size until it assumed the proportions of a magnificent temple, the roof of which was supported by a series of mighty columns having capitals wonderfully carven into the semblance of bulls' heads and shoulders, upon which the beams of the roof rested. The walls of the building were composed of brickwork, lined on the inside with large and beautiful slabs of alabaster rich with sculptured figures in bass-relief and mysterious inscriptions. I saw that the main part of the temple was filled by a strange Aryan people, evidently gathered for a religious observance of some importance.

Several priests were in the ceremonial space of the temple, at the south end of which burned a fire of sandal-wood in a vase-like vessel, upon which one of the priests, from time to time, threw *boi*, or incense, which exhaled the grateful odour I had some time before become sensible of. The ceremonial furniture of the temple was of the rarest workmanship and materials; while the ritual practised by the priests ineffably appealed to the æsthetic side of my nature. But I was chiefly attracted by the literary and ethical beauty of certain passages from their religious scriptures, as recited from time to time in a musical voice by the chief officiating priest. After listening to several recitations in praise of their deity and the cardinal virtues, my intensest interest was aroused by the following:—

"Ye sons of Hêchad-aspa Spitama! to you I will speak; because you distinguish right from wrong. By means of your actions, the truth contained in the ancient commandments of Ahura has been founded!"

Had this not some bearing on the question which was agitating me? Was it not indeed a

tribute, by the most ancient civilization that we know of, to the moral value of the labours of the founders and expounders of human laws?

Again the thaumaturgie influences that held me in their spell proeeeded to aet. The temple faded from my view, and in its place arose the beautiful groves and smiling gardens of the Aeademy. Plato—the 'Supreme Thinker,' the grandest figure in Greek philosophy—was there, holding sweet eonverse with his pupils. I shall never forget the simple majesty of his bearing, or the amiability of his answers to all those who questioned him. "Mankind," he said, "must have laws and eonform to them, or their life would be as bad as that of the most savage beast. . . . . For if a man were born so divinely gifted that he could naturally apprehend the truth, he would have no need of laws to rule over him; for there is no law or order which is above knowledge, nor ean mind, without impiety, be deemed the subjeet or slave of any man, but rather the lord of all. I speak of mind, true and free, and in harmony with nature. But

then there is no such mind anywhere, or at least not much; and therefore we must choose law and order, which is the second best" . . . Once more I heard him speak, and it was to give utterance to this splendid truth: "Is not Justice noble, which has been the civilizer of humanity? *How then can the advocate of Justice be other than noble?*"

And here I had the answer of Hellenic culture to my question.

But again the scene is changed. Now it is Rome under the dictatorship of Cæsar. In the library of an unpretentious house in a quiet quarter of the city—equally remote from the place of his great forensic achievements and the vicinage of where machinations against the ambitious Dictator were fast gathering to a bloody head—I behold the greatest Advocate, and one of the clearest intellects the world has ever known, seated, and busy with *stilus* and *tabulae*. As he pauses for a moment in his writing, I glance over his shoulder and read:—"Law is the highest reason implanted in nature, which commands those things which ought to be done and pro-

hibits the reverse . . . . The highest law was born in all the ages before any law was written or the State was formed. . . . Law did not then begin to be when it was put into writing, but when it arose, that is to say, at the same moment with the mind of God."

This was the answer republican Rome vouchsafed to my all-absorbing question.

Onee more the seene was changed. Now I am viewing the study of a quiet eountry reetory in the foremost period of intelleetual England. I see a small company of men, whose names are set as jewels in the pure gold of English literature, listening to one of their compeers reading from a manuscript. I strain my ear to catch the words that fall from his lips. They are these:

"Of Law there can be no less aeknowledged, than that her seat is the bosom of God, her voice the harmony of the world. All things in Heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power. Both angels and men, and ereatures of what eondition soever, though eaeh in different sort and

manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

I was now beginning to feel that my doubt had been resolved, but the mysterious power that was operating within me had yet to present a supreme and final test.

Before my vision there appeared a picture of a fertile hill-side rising gently from the blue waters of the Lake of Tiberias. There, surrounded by His disciples, is seated the Divine Man, who, during His earthly sojourn, repeatedly showed by His own example the moral propriety and efficacy of obedience to the supreme civil authorities. He is instructing His chosen band of followers in the matters in which all men must busy themselves if they wish to inherit eternal life; and it is interesting to observe the zeal with which they drink in the meaning of His clear and simple teaching. Anon, I seem to hear Him utter the wonderful words of the Golden Rule, that thenceforth was to lie at the base of every enduring system of Positive Law: "Whatsoever ye would that men should do to you, do ye

even so to them; for this is the Law and the Prophets!"

Thus was my question finally answered.

Whilst I awoke to the consciousness of external things there fell upon my ear the sound of Cathedral bells; and, as I listened, their chimes moulded themselves into the joyous music of the *Adeste Fideles*.

PART II.

VERSES AND VERSIONS.

HYMN TO JUSTICE.

"Aurea prima sata est aetas, quae vindice nullo,
Sponte sua, sine lege, fidem rectumque colebat.

—Ovid. *Met.* 1, 89.

"I demand on behalf of Justice that, having been shown to have reality and not to deceive those who truly possess her, she may now have appearance restored to her; and thus obtain the crown of victory which is hers also."

—Plato: *The Republic*, ii. 444.

DAUGHTER of sovran Zeus, the lord of all,
Astraea, who didst know a mortal throne
What time the ages ran their golden zone,
Honour and Praise! Oh, that we might recall
Those happy days when Earth, unvexed by brawl
Of lust and strife, sang to the stars
Sweet lauds of peace, and knew not wars;
When men wrought not for self alone,
But rather for the common good,
All welded in one brotherhood!
Thrice happy days, ere thou wast driven
By Mammon's ruthless horde from Earth to Heaven!

II.

Spirit of Justice, not all desolate
Didst thou leave Earth, thy whilom pleasant home—
For, as a star set in the ambient dome,
Thou beaconest to those who on thee wait
For light to thread the path of Duty straight.
And as the scent of some rare flow'r
Haunts its abode for many an hour
After its leaves to nothingness have come,
So what thou taughtest Man on Earth
Within his laws is shadowed forth
Through all the avenues of Time—
A spur and talisman of deeds sublime!

III.

Great souls have gazed upon thy loveliness
From Wisdom's heights; and when the vision rapt
Had sure unfolded what thou would'st have kept
As Right inviolate, that did they press
On Man's observance with supremest stress.
We hear thy note in Vedic song,
The Prophets burn with hate of wrong ;

And Plato's trump thy wondrous message
swept
Throughout a pagan world grown grey !
And so we children of to-day
Upon the corner-stone of old
Would fain uprear another Age of Gold.

IV.

Imperial Rome foreshadow'd thy return
When Caesar's fiat launched her code of laws
That breathes thy savour in its every clause,
And sets thy seal on Earth's remotest bourn.
Oh, they are blind who cannot now discern
The dawn of a new jural reign,
When thou shalt live with men again ;
When only he may win the world's applause
Who yields his brother truth and right,
And mirrors in his life thy light ;
When all the surging waves of Hell
Shall break in vain on thy strong citadel!

V.

O Goddess, Essence, whatsoe'er thou art,
Let the glad pæan thrill our wistful ear:
"Astraea Redux ! Once more is Justice here

To make her lodgment in the human heart,
Nor from that loved abode to e'er depart !''
Ah ! this is what Man long has sought,
The end for which his laws have wrought,
The goal and crown of all the soul holds dear.
Come, then, and bring us sweet surcease
Of wrongs that long have slain our peace;
Come, and the day millennial bring—
Come usher in the reign of Christ the King !

RUDOLF VON GNEIST.

(Obiit, 22nd July, 1895)

THE world owes much to Germany: she reared
Men of titanic mould when other lands
Bore dwarfs. Crowned in her might to-day she stands
A very queen of States, serene, revered.
And thou, great Soul, who now thy bark hast steered
From Earth's low marge to the Elysian sands,
Wert ever true to Duty's high commands.
Not thine the sword, to make thy country feared,
But thine to lend a splendid skill to frame
The fabric of her laws both strong and well—
A prouder meed no patriot could claim!
Thou wert not insular; a love of Right
World-wide constrained thee here. Now perfect sight
Reveals thee Justice on her citadel.

*HORACE GRAY.**

(Obiit, September 15th, 1902)

WHAT time I look upon that full-arch'd brow
And feel the magic of those eyes that burn
A great Soul's beacon-fires, straightway I turn
My mental vision—pleased the while enow—
Back to the days when England's law did grow
A stately fane beneath the master hands
Of patriot-lawyers—rare in other lands—
Who loved their science and their country, too.

'Midst them shall Fame assign thy portion, Gray!
Thou wert a lawyer of the English mould,
And prone to reason in the English way.
Know, then, where'er the Common Law doth hold
The men of common speech, there men shall pay
Thee honour, as they pay thy peers of old.

* Suggested by a portrait of the late distinguished Judge in the AMERICAN LAW REVIEW.

CHRISTOPHER ROBINSON.

(Obiit, 31st October, 1905)

GOD is no niggard when He makes a man
To stand as an exemplar to his time.
The strength that crowns him, and the aim sublime
Moulding his every action that we scan
Persuade us that not here is our true clime;
Not here in this low vale where Life began
But ends not, no, nor ever sees its prime,
Shall we the Soul's high mansion build or plan.

Even such an one was he who late hath gone,
Beyond our greetings and beyond our ken,
Into the Master's peace and benison.
Careless of honours prized by lesser men,
From youth to age he held our homage, then
Ended at eventide his race well run.

THE LAW AND THE MUSES.

(To a kindly Critic.)

IN sooth, dear Friend, I'm at the end
Of all my store of patience
Because the Bar is waging war
Upon my lucubrations.

What boots it all your critic soul
Doth find my verses killing,
When editors and creditors
Won't rate them worth a shilling ?

In vain I grace a leading case
With flowers from Castalia,
The philistine will ne'er decline
To dub the job a failure.

To me of late one came to prate :
"The law is hurt by banter ;
"A case in rhyme it is a crime
"That should be purged instanter."

"Your causeries and parodies
"To me are flippant horrors ;

"I'd rather lark with Baron *Parke*
"In 'beautiful demurrers'."

In righteous rage I showed the page
Where *Pollock* woos the muses ;
Where *Irving Browne* the laurel crown
Wears proud with no excuses.

My censor next I showed the text
Of *Tenterden's* high rhyming ;
Dan *Blackstone*, too, was in the crew
We saw Parnassus climbing.

Both *Mansfield* prim and *Bowen* trim
Came lilting a cadenza;
My philistine he fell supine
When *Coke* croaked out a stanza !

But though I prove a man may love
The muse and be a jurist ;
My verse or sereed they will not read—
For fame I'm still a tourist.

My time's misspent ! I must repent,
And burn the things they're spurning ;
And then, dear Friend, will Heav'n forfend
My chanee of future burning.

INTEREST REIPUBLICAE UT SIT FINIS LITIUM.

MARRIOTT v. HAMPTON
(7 T.R. 269)

(With apologies to the shades of Messrs. Durnford & East.)*

'TIS strange that clothes perform so great a function
Through anthropology's progressive stages!
In sooth they are but an embalming unction
To keep Man's manners for succeeding ages.
Whose archæologists and other sages
(Drear revellers in wreck and rust and runes !)
Proudly expound them in most learned pages
And trace his lineage back to grim baboons
By dint of Fashion's pranks with his best pantaloons.

And mention of these garments cuts me short
From prefatory chatter at my ease,—
So fatal in things legal, where one ought
To boldly plunge at once *in medias res*—
For trowsers now I sing, and if it please

* My theory of the facts is one suggested in Shirley's Lead. Cas., 2nd ed., 197.

My readers that a moral gain admittance,
'Twill be my aim to show how ill agrees
The law with laches, how youths on a pittance
Whene'er they pay a bill should keep its full
acquittance.

Young Marriott was a dude, this I must own,
What time the goddess *Ton*, exiled from
France,
Erected her gay shrine in London town
And led John Bull a very giddy dance.
Ye gallant's waistcoat's pied extravagance
Divided honours with his storied hat,
The *sans-culottes* had set a style in pants
That sent knee-breeches to the owl and bat—
Faith, many a man with shrunken shank waxed glad thereat!

In the fore-front of fashion Marriott hied
Him to his tailor—Hampton in the Strand—
And purchased trews whose lurid hues outvied
The dyeing triumphs of the Tyrian hand;
And, having ducats then at his command,
Paid for his trowsers like a little man,—
Full proud from th' stunned tradesman to
demand

Receipt therefor—a most prudential plan.
Alack, he did not end what he so well began!

Flushed with high hopes of capturing the mall
By this new splendour of his nether man,
Back doth he haste unto his lodgings small
And there his toilet makes in shortest span—
Pleased as a maid with beauty-patch and fan!
Then, careless wight, among his *billets-doux*
And piles of litter of a kindred clan
The tailor's full receipted bill he threw—
'Twere meet that such a deed should reap a woeful rue!

Time passes on, and in the shocks of chance,
Sartorial Hampton, meeting Fortune's frown,
Flies to his books and scans their drear expanse
Of debts full hoary and eke outlawed grown.
His saddened eye casts the long columns down,
And many a sigh the while his bosom racks,
Till Marriott's name in debit side is shown
For trews late bought, and credit entry lacks!
Ah, now that tailor's mien of woe for Marriott smacks!

Eftsoons to the King's Bench our hero's haled,
There to defend a suit the tailor pressed
With hotter zeal than e'er his goose assailed
Suits of his patrons when on Fortune's breast
He basked serene. And now the debt's con-
fessed,—
But lo ! when plea of payment is advanced
Where is the proof defendant once possessed ?
At Eeho's answer "Where?" he stands en-
traneed,
And sees the fatal bill by trial costs enhaneed!

* * * * * * *

Fate's but a humorist, and Man her toy !
Our Marriott, anon, (*sans* work of better kind)
In sorting missives that onee brought him joy
Haps on the bill the varlet Hampton signed
As paid in full, where it had long reclined.
Loud on Justitia for revenge he cried:
(She is not deaf, he thought, though she be
blind !)
"My eount, your lordships, eannot be denied ;
"It is for money had —the knave's both rob-
bed and lied !"

KENYON, C.J.: "Your case in sentiment
"Is founded strong, but sadly lacks in law ;
"I am afraid of such a precedent.
" 'Twould ope too wide fell Litigation's maw
"If parties knew that they to Court might
draw
"Some proof which they, through laches, did
omit,
"And open suits adjudged. That were a flaw
"Our system wots not—for, so it is writ,
"*Interest reipub. ut finis litium sit!*"

And all the *puisne* judges did agree
(As well becometh brethren great and small)
That Marriott must go thence and learn to see
The moral of the words their Chief let fall ;
Which, put in simple phrase, is plain to all :
(Perhaps I've said it in my second verse—
Yet, nathless, it is worthy a recall !)
That negligence in all things is a curse,
But negligence in law-suits!—Well, there's
nothing worse!

LA BELLE DAME SANS MERCI.

(*D'après* Keats.)

MONTAGUE v. BENEDICT : 3 B. & C. 631.*

WHAT can ail thee, Montague,
Alone and palely loitering?
The look is in thy hollow eye
Ill-hap doth bring.

O what can ail thee, man of pelf,
So haggard and so woe-begone?
For, certes, gold is to be had,
And pa..ons to be 'done'!

*It is a 'vulgar error,' traceable apparently to this case, that 'jewels are not necessaries'; yet the case only decides that in view of the defendant's social and financial circumstances, and his wife's fortune, the trinkets supplied to the latter by the plaintiff could not be considered part of her necessary apparel. Where a husband and wife are living together the term 'necessaries' is defined by Willes, J. in *Phillipson* v. *Hayter*, L.R. 6 C.P. 38, as articles "really necessary and suitable to the style in which the husband chooses to live, in so far as they fall fairly within the domestic department which is ordinarily confided to the management of the wife." When they are living apart, the presumption that the wife has her husband's authority to purchase 'necessaries' does not always apply—but that, as Mr. Kipling says, is another story.

I see a paper in thy hand,
A judgment dight with stamp and seal:
It holds thee with a mystic spell,
Thy senses reel.

"A lady visited my shop,
A *feme covert*—but not my wooing—
Her eyes full bright, and purse full light,
Were my undoing."

"A golden dagger for her hair,
And bracelets, too, and jewelled zone,
I wrought for my fair customer—
Their price I moan."

"Her promises lulled me asleep,
Her lord would pay—ah, woe betide !
The siren looked as she spoke true
The while she lied."

"Eftsoons I haled him to King's Bench,
(A fearsome thing—he practised there !)
But Benedict his wife's smooth speech
Did straight forswear."

"Ah, me ! My trinkets rich and rare
He neither purchased nor had seen ;
His wife must dress in modest guise,
Not like a queen."

"To give her sixty pounds a year
Was all he might (my bill was more !)
Beyond her station were these gauds—
All this he swore."

"Twas vain I urged '*implied assent*'
And all the burden that it carries ;
The Court adjudged my jewels were
Not '*necessaries*'."

"Then as they found no '*agency*'
Of wife for husband *re* my bill,
In law or fact, they handed down
A non-suit chill."

'And this the paper in my hand,
A judgment dight with stamp and seal:
It holds me with a mystie spell,
My senses reel."

SIC UTERE TUO UT ALIENUM NON LAEDAS.

FIRTH v. BOWLING IRON COMPANY.
L.R. 3 C.P.D. 254.

ALACK ! sweet Muse, not mine the high emprise
To sing the cherished Ram of Polypheme,
The Zebu all good Brahmins patronize,
Nor yet the steeds of Phœbus's proud team—
I sing the passing of Dame Firth's mileh eow.
(A meet yoke-mate for Pegasus in plow !)

Defendants delved in mines of coal and iron
Beneath the plaintiff's farm in York's old shire ;
And, 'gainst the straying kine, they did environ
Their gaping pits with fenee of braided wire—
A sage deviee if well maintained, in sooth ;
A snare withal if left to Time's sharp tooth !

Now iron oft is good for man and beast
When taken in the form ealled iodide ;
But in its eommon state, to say the least,

Is no fit lodger for a cow's inside !
So, when our heroine had grazed her fill
From sward besprent with wire, she fell quite ill.

She died. A 'Vet.' was called, skilled in his art.
"I swear," quoth he, *sans* thought of irony,
"This cow 'gainst living more did steel her heart !
"Her pericardium's strung up to 'C'
"With wire that erstwhile fenced the Bowling Works.
"Go sue the careless wights ; they're worse than Turks !"

* * * * * * *

Cave, for the plaintiff : "Clear law 'tis to-day
"That he who puts upon his low—or high-lands
"A lethal thing, all damages must pay
"That flow therefrom (see *Fletcher* versus *Rylands*)."
Swift, contra : "Here no laches doth arise,
"And *Wilson* versus *Newbery* applies !"

Per LINDLEY, J.: "We think defendants knew
"The woe their fence would work when waxen
old ;
"Their duty was to keep it staunch and true,
"Nor let it knock the plaintiff's cattle cold
"Unseasonably. Wire fences have their use,
"But not in wrestling with cows' gastric juice!"

"Anent this case the law's plain to the Court";
[Though rhyme forbids the very words em-
ployed,
Yet have I not committed false report.]
" 'Tis couched in a sound rule, of doubts
devoid,
[Which writ in full above, just here may read
as :]
"*Sic utere tu' non alienum laedas!*"

CONTRACTS IN RESTRAINT OF MARRIAGE.

Lowe v. Peers.

(4 Burr. 2225.)

THIS is a tale of by-gone years—
Of love and law and Newsham Peers.

Likewise the rue of Cath'rine Lowe
I, by these presents, fain would show.

Kate was a widow fair and fat ;
Her age ?—I've naught to do with that !

Her Newsham loved while he was young—
A facile scribbler, slow of tongue.

(And love-sick youth with pen and ink
Can harm itself as quick as wink !)

Then must not Newsham dree his dreed ?
For sealing Kate this solemn deed :

"I hereby promise Cath'rine Lowe
With none else to the altar go ;

"But, should I wed another lass,
One thousand pounds to Kate shall pass."

O lackaday, and woe is me,
That man should so inconstant be !

He married— but the records show
That proud Dame Peers was never Lowe.

(In sooth he vowed to love till death
Not Kate but rare Elizabeth !)

* * * * * * *

She dried her tears, our Katy did,
When thus her lawyer Katy chid :

"Why weep ? A thousand pounds, I trow,
Is worth a thousand Peers or so !

"So dam your eyes !" (that sounds profane
But, written out, the meaning's plain !)

Then, e'er his honey-moon has paled,
Wight Newsham to Westminster's haled.

But MANSFIELD eyes the deed askance ;
"This cannot hold by any chance !

"'Tis not a pledge to marry Kate,
And yet, to judge Peers celibate

"*Propter* this deed, would over-draw
The policy of English law.

"The contract's dead, as Cæsar's dead,
Because it curbs the right to wed !"

Whereat the Judges did report
That Katy Lowe was out of Court.

—And thus the little drama went
To make a legal precedent.

WIFE'S AUTHORITY TO CONTRACT FOR HUSBAND.

MANBY v. SCOTT.

(1 Levinz, 4 ; 2 Smith's L.C., 433.)

NOW love in a cot is a very good thing,
And love in a palace is better ;
For Cupid's rare crown makes any man King,
While Kings are made men by his fetter.
But the drama of life
With love in the plot,
And no blemish of strife,
Was not
The sweet lot
Of two people namcd Scott.

With madame's caprices by him ill-endured,
Their lack of agreement was crying ;
Faith, it seemed that their fortunes could only be cured
By one of them skipping or dying.
So a chivalrous friend

Was convinced that he ought
(Such evil to mend !)
To trot
With Dame Scott
To some halcyon spot.

They went ; and Sir Edward for twelve happy years
Lived a life both sedate and serene.
Then, vice having reaped less joyance than tears,
Dame Scott reappears on the scene.
But Sir Edward he proved
An obdurate Scott ;
Though once he had loved
He'd not,
By a jot,
E'er efface his wife's blot.

Woe's me ! but Dame Scott must have clothes to her back,
And Manby's rare silks suit her well :
"Won't dear Mr. Manby supply her sore lack,
And send rude Sir Edward the bill ?"

Now that very morning
Mr. Manby had got
Formal warning
From Scott
That he'd not
Pay for any such shot.

But the goods were supplied ; and a suit next we see,
Testing rights of a wife in such cases.
Per Cur : "The defendant is surely Scot (t)-free,
"For where is an agency basis?
"The wife can't have credit
"When husband says not—
"And he's said it!
"So Scott,
"Bid ye wot,
"Takes no scath from this plot."

DOG-LAW DOGMAS.

I. DOGS AND TRESPASSERS.

(SARCH v. BLACKBURN, 4 C. & P. 297.)

REGULA: Contra nocentem tenere canem non est culpa.

SING the old Ford watchman: (What
better name than Sarch
For him who spent his vigils in dogging
mischief's march?)

But Fate, with her grim ironies, ne'er lets us go
unflogg'd;
And this dog's tale unfolds to us how doggers
may be dogg'd.

Defendant was a milkman; and lest his pat-
rons saw
How milk and water coalesce, he kept a canine
jaw

To fright away all trespassers; and up this
legend nailed:
"Beware the dog!"—a sign before all hearts
but Sarch's quailed.

'Twas not so much that Sarch's nerve pro-
claimed heroic breed,

As that the plaintiff in his youth had not been taught to read.

One summer morn, his duties done, the plaintiff left his beat,
And plann'd to cut through Blackburn's lot and save his weary feet.

In vain kind Phœbus threw his rays on that portentous sign ;
Unletter'd Sarch maintained his march past pigs, and fowl and kine.

The kennel's near, yet no one warns—the men are in the mews,
A moment more and Towser's teeth are fastened in his trews !

Though homespun's tough, 'twas not enough those sharp teeth to enmesh ;
A lucky Shylock Towser proved—he *got* his pound of flesh ! *

* By no exercise of poetic license may a dog be set down as able to remove a pound of carnous tissue at one fell bite, hence we feel it incumbent upon us at this juncture to unhorse the reporter from Pegasus, and bid the latter go to grass, the former to prose, so that Sarch and his cause may be reported aright. See Note on this case, post, p. 278.

II. THE SCIENTER IN DOG-LAW.

SING, tuneful Muse, from your Pierian dell,
(You'll have to help me for I can't sing well !)
Please sing the *Canidæ*, you will not weary us—
We're sober lawyers, though our star's not Sirius !
('Tis pale Astraea beckons us to Heaven—
Adumbrative in Coke, but clear in Beaven.)

What dearer theme than dogs our pen bestirs?
Man loves them all—both thoroughbreds and curs.
Perchance they've souls—now prithee, don't say "Psshaw" !—
Mens rea's theirs in Massachusetts' law. (*a*)
'Tis true that legislation frets them now ;
But that's because their ranks unduly grow
In cities, where our nerves get such ill-usance
They oft regard sweet singing birds a nuisance.
But dogs at Common Law were treated well
If honest truth the old Reporters tell.
Ferae naturae non, the cases say,

(*a*) *Hathaway* v. *Tinkham*, 148 Mass. 85.

Down from the time of Sir John Holt, C.J. (*a*)
"*Bad law*," you cry, with Towser at your
calf;
"*Yet law*," replies his owner with a laugh.
You go to Court, the dog is cleared amain:
"He's bit but onee—and may not bite
again"; (*b*)
"A dog, forsooth," (thus runs the Court's ad-
vice)
"Is mansuete till he's lunched upon you
twiee!" (*c*)
But after that he's no experimenter, (*d*)
He's *ferus*, and you set up the *scienter*. (*e*)
So far from mercy then the dog reeedes
He may be hung for his carniv'rous deeds. (*f*)
And in his dining he can't wait for curries,
A half-hour's fatal 'twixt two single worries. (*g*)
Nor, if provoked to make bite 'number two,'
Will that avail to shield him from his rue. (*h*)

(*a*) *Mason* v. *Keeling*, 12 Mod. 332.
(*b*) *Fleeming* v. *Orr*, 2 MacQ. H.L.C. at p. 25.
(*c*) *Ibid.*, at p. 23.
(*d*) *Beck* v. *Dyson*, 4 Camp. 198; *Vrooman* v. *Lawyer*, 13 Johns. (N.Y.) 339.
(*e*) *Spring Co.* v. *Edgar*, 99 U.S. at p. 654.
(*f*) Per Lee, C.J., in *Smith* v. *Pelah*, 2 Strange 1264.
(*g*) *Parsons* v. *King*, 8 T.L.R. 114.
(*h*) *Smith* v. *Pelah* (*supra*); *Fake* v. *Addicks*, 45 Minn. 37.

Ay, more! Onee Towser bites, he may be brought,
In proprio corpore, before the Court;
There to assist the drowsy jury's mind
In judging if his owner deemed him kind; (*a*)
And if the jury learn he has been chained,
Thus the *scienter* they may find maintained. (*b*)
In self-defenee a bite's within the law,
But let the dog bite quick or hold his jaw;
If he delays and later vents his spite,
He's simply slept upon his legal right. (*c*)
"If I am bitten, I may kill!" you say:
Not so if Towser bites and runs away. (*d*)
(The Muse digresses—but not ours to damn:
Que voulez-vous? Peste! C'est methode de femme.)
A man may keep a vieious dog to guard
His eurtilage—but let him be in ward;
If *licensees* are bitten when they enter,

(*a*) *Line* v. *Taylor*, 3 F. & F. 732.
(*b*) *Jones* v. *Perry*, 2 Esp. 482; *Webber* v. *Hoag*, 8 N.Y. Supp. 76.
(*c*) *Keightlinger* v. *Egan*, 65 Ill. 235; *Linck* v. *Scheffel* 32 Ill. App. at p. 21.
(*d*) *Morris* v. *Nugent*, 7 C. & P. 572.

A judgment's theirs *sans* proof of the *scienter*.(*a*)
But *trespassers* at night fare not so well,
They risk the canine being kind or fell. (*b*)
Tho' when *you* trespass, with your dog appendant,
His bite will throw all burdens on defendant. (*c*)
E'en harbouring a dog you do not own
Will mulct you if his viciousness be known. (*d*)

EPILOGUE.

And so the doctrine runs at Common Law,
When mortals suffer from the canine jaw.
So, be he bitten, 'tis beyond dispute
A man is worser off than a dumb brute.
For when of sheep your dog proves a tormenter
The plaintiff need not set up the *scienter* ;
You're liable by statute, and are fined
Whether you knew the culprit fierce or kind.
The moral is : *Guard Towser all you can;*
But when he bites, pray let him bite a man !

(*a*) *Smillie* v. *Boyd*, 24 Sc. L.R. 148; *Muller* v. *McKesson*, 73 N.Y. 195.
(*b*) *Sarch* v. *Blackburn*, 4 C. & P. 297; *Loomis* v. *Terry*, 17 Wend. (N.Y.) 497.
(*c*) *Beckwith* v. *Shordike*, 4 Burr. 2093; *Green* v. *Doyle*, 21 Ill. App. 208.
(*d*) *McKone* v. *Wood*, 5 C. & P. 1; *Wood* v. *Vaughan*, 28 N.B. 472.

PROVERBIAL PHILOSOPHY.

I.

ACTUS non facit reum nisi mens sit rea.
"*No man is guilty, whatso'er his wrong,*
Unless intention lurks behind the deed."
Thus runs the Criminal Law: my little song
But paraphrases what in *Coke* you read.

II.

Qui facit per alium, facit per se.
"*Who does a thing by proxy*
Himself the thing has done."
Dost doubt my orthodoxy?
See *Coke on Littleton.*

III.

Qui prior est tempore, potior est jure.
"*Who's first in time hat' better right*"—
So Equity affirms.
This maxim points the moral trite
Of early birds and worms.

IV.

De minimis non curat lex.
"*Trifles the Law doth not regard*"—
A maxim strange, in sooth ;
If poor, go steal a pound of lard,
And test your chance for ruth !

V.

Multitudo imperitorum perdit curiam.
"*When ignorant attorneys swarm*
And ply their business in a Court
The Court itself must come to harm"—
That's what this proverb says in short.

VI.

Judex est lex loquens.
"*The Judge on the Bench is the mouth-piece of Law*"—
That's a matter we seldom consider ;
If the brain of the Law's in the Bar then the jaw
May wag at its pleasure forever!

L'ENVOY.

WHY should we ever dull the edge of keen emotion
When all Mirth's ministers run riot in the heart
Lest some forbidding sage should chide us with the notion
That blithesomeness and wisdom dwell in worlds apart?
Pan's pipe laughs clear in Milton's orchestra,—
Oft epic Dante sings an aria.

The dulcet and the dour, and laughter close to sighing,
Such is the common round—our heart's true regimen;
Else of our little life the better part were dying—
Who were not rather dead than live a changeless span?
Take, then, sweet Muse, this off'ring at my hand,
Or grave or gay 'twas sung at thy command.

Note on Sarch v. Blackburn.*

The following proposition of law is a fair deduction from the instructions of Tindal, C.J., to the jury in this case : *A person is justified in keeping a dog in his yard for the protection of his premises, and if one in the act of trespassing upon such premises is bitten by the dog, he has no right of action against the owner.* But the learned Chief Justice said that a man has no right to keep a ferocious dog in such a situation, in the way of access to his house, that a person coming there for a lawful purpose may be injured by it. In such a case the owner of the dog could not excuse his liability by showing that he had posted up a danger notice by which the person injured might have been put on his guard had he read it. (See also *Brock* v. *Copeland*, 1 Esp. 203; *Curtis* v. *Mills*, 5 C. & P. 489).

In the United States it is no defence for the defendant in an action for keeping a vicious dog to show that the plaintiff was at the time trespassing upon the defendant's property, for the purpose of hunting (*Loomis* v. *Terry*, 17 Wend. [N.Y.] 497); or of picking berries (*Sherfey* v. *Bartley* 4 Sneed [Tenn.] 58); or for no particular purpose (*Pierret* v. *Moller* 3 E.D. Smith [N.Y.] 574). Concerning a householder's right, in general, to protect his grounds, Cowen, J., said in *Loomis* v. *Terry* (*supra*) : "As against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that, in these and the like cases, the defendant shall not be justified even as against a trespasser, unless he give notice that the instrument of mischief is in the way." See the Quebec case of *Dandurand* v. *Pinsonnault* (7 L.C.J. 131), decided under the Civil Law, but enunciating practically the same doctrine as that of the above cases in the American Courts.

* Ante, p. 270.

PART III.

CAUSERIES JUDICIAIRES.

CAUSERIES JUDICIAIRES.*

THE publication of *The Pathways to Reality*, by the Right Honourable R. B. Haldane, K.C., which comprises a series of the 'Gifford Lectures,' serves to remind us that the English Bar has not yet forsworn its learned traditions. Mr. Haldane's name is perhaps more widely known to us by reason of his professional connection with many important Canadian cases before the Judicial Committee of the Privy Council; but he holds a high place in the estimation of the savants and literati of his native land by reason of his books, and withal can find time for the faithful performance of the duties of a Member of Parliament. To be admitted to the honour of delivering a series of Gifford lectures before the University of Edinburgh is a certificate of intellectual fitness that few are privileged to possess whose energies are wholly devoted to

Law and Lore

* These writings were contributed to the *Canada Law Journal* between the years 1896 and 1905.

scholarship ; and for the choice to fall upon one who plays a busy part both at the Bar and in Parliament is a distinction indeed. To give some idea of Mr. Haldane's contributions to philosophy and literature we may mention, in addition to the work referred to, his *Essays in Philosophical Criticism*, *Life of Adam Smith*, his translation (in collaboration with Mr. Kemp) of Schopenhauer's *Die Welt als Wille und Vorstellung*, and *Education and Empire* published in 1902. This is a catalogue fit to be the product of a life-time, but Mr. Haldane is a young man yet with many years of usefulness before him in the ordinary course of nature.

It is just such a case as Mr. Haldane's that emphasizes the difference between the English and Canadian points of view with regard to the expediency of limiting the lawyer's intellectual activities to the domain of the law. In England it has never been a deterrent to professional success to be suspected of literary leanings, or to be known to devote a portion of the day to walking 'studious cloisters' outside the jurisdiction of Themis. In Canada,

and to a certain extent in the United States, there is an unreasoning prejudice against the 'literary lawyer'; and clients shy at the door of him who

> "Murmurs near the running brooks
> A music sweeter than their own,"

but are in no wise fearful of trusting their legal fortunes to one who flirts with politics—an enterprise which kills more good lawyers than anything else I know of. I have never seen the case for literary diversion as against political dalliance on the part of lawyers better put than in the following passage: "One can choose his opportunities to study and write when other engagements do not press. But he who is influential in political life has no moment to call his own. He must make and keep regular appointments, no matter how much his business is interfered with; and besides this, he commonly spends many valuable hours in private consultations, in countermining and petty diplomacy. The lawyer who takes literature instead of politics as his 'led horse' has much more command of his

time, and unquestionably much less exhaustive drain upon his vital energy."

Bolingbroke in his day found cause to chide the 'mere lawyer,' and counselled those who would devote themselves to the province of jurisprudence to approach it by the 'vantage-grounds' of metaphysical and historical knowledge. When one casts his eye over the illustrious roll of savants and authors who have adorned the English Bench and Bar from Bacon to Mr. Haldane, he is ashamed of the provincialism that hedges about the ambitions of the profession in our own country, and is constrained to urge a prompt widening of our horizon in this respect.

"There are more things in heaven and earth, Horatio,
Than are dreamt of in your philosophy."

THE popular opinion that Astraea and the Muses are not the best of friends is quite a mistake. History tells us that the laws of Pittacus were in verse, and so were those of Charondas (See Gibbon's Decl. and Fall R.E. ch. 44). It is also on record that in ancient Erin the poets were regularly entrusted with the exposition of the laws—and not altogether with the happiest results to the judicial bards, so it is said. Unfortunately, on one occasion a bard erred so prodigiously in his metrical rendering of a certain *ratio decidendi* that the legislative authority determined then and there to rob the sweet singers of their forensic functions. This was, no doubt, the beginning of the era of prosy judgments. It must be remarked, however, that the change did not wholly produce the desired improvement, for Irish judges have been known to err in prose. Blaekstone, it is true, felt himself impelled to abandon his muse after he entered upon the serious business of the law, but his desertion was more formal than real, as I elsewhere

Law and the Muses

suggest in this book. Again, one of the most illustrious lawyers of our own times—Sir Frederick Pollock—is wont to put aside frequently his learned researches, so that he may refresh the real inner man with the waters of Aganippe. Baron Alderson was given not only to waggery but to Weggery. Lord Bowen translated the *Aeneid* while he was on the Bench, badly enough it is true, but the demerits of the translation are not to be attributed to his legal training. Then there is the case of Sir John Davies, the first reporter of Irish decisions, of whom Wallace ("The Reporters," p. 229) says "he was one of those rarely found men to whom Heaven gives genius." Death robbed him of the Chief Justiceship of England under James I., but could not rob him of the splendid fame accruing to him from his poem "On the Immortality of the Soul," written after he had gone to the Bar and had become a busy member of Parliament. By the way, it would do none of us any harm to read that noble poem if we have hitherto neglected it. It is capable of restoring our faith in more than poetry.

PERHAPS of all the many *cruces* in the stern domain of the Common Law that present themselves to the 'man in the street' the one embodied in the maxim *Ignorantia legis neminem excusat* is the chiefest. Indeed, if he were patiently to study some of the explanations of the reason of the rule attempted by certain English judges and commentators upon the law, he would in no wise see occasion to change his preconceived opinion as to its utter inscrutability. Why, he reasonably asks, should a layman be bound to know the law when judges and lawyers on occasion, either confessedly or demonstrably, are ignorant of it ?

Fearsome Ignorance

In the reign of Edward I. we find a consciousness of the fundamental importance of this doctrine stealing over the minds of our pioneer law-builders ; and a very funny, though ingenious, reason for it is put forward in Y.B. 39 Edw. I., T. Pasch., to the effect that no person should excuse himself for ignorance of the law, because every person is represented

in Parliament and so assents to the laws there made! Some two centuries afterwards old Christopher St. Germain, in his *Doctor and Student* (see Muchall's ed., p. 250), declares it to be a first principle of English law that "ignorance of the law ('though,' he naïvely adds, 'it be invincible') doth not excuse"; and he thereupon proceeds to expound its reason in much the same terms as are to be found in the Year Book above cited. Now, putting aside the consideration that the fallacy of this reason is demonstrated in the fact (so much truer then than to-day) that but a small portion of our law is of Parliamentary origin, such an hypothesis must be held untenable simply by reason of it being founded upon a most novel and unwarrantable extension of the doctrine of Estoppel.

In the case of *Lansdown* v. *Lansdown*, decided in 1730 (Mos. 364), Lord Chancellor King is reported to have said, without exploiting the principle of it, that the maxim only obtained in criminal cases, and did not apply to civil suits. But that, as Holland says (*Jurispr.*, 7th ed., p. 95), is clearly not the law.

Lord Ellenborough, in *Bilbie* v. *Lumley* (2 East, 472,) substantially declares that every man must be taken to be cognizant of the law in general, on account of the convenience subsisting in such a presumption ; and in coming to that conclusion he very nearly compassed the whole truth of the matter. Since the decision in *Bilbie* v. *Lumley*, the doctrine has, in the main, been held to be unassailable in all the Common Law courts—yet few, if any, of the cases lay down the unqualified proposition that ignorance of the law will never entitle one to relief. In Equity, the principle has evoked fruitful discussion ; but as Snell says (*Equity*, 9th ed. 523) it "is about as much observed in Equity as at law." Courts of Equity have, indeed, granted relief in cases where the party has suffered by his mistake of law ; yet all such cases will be found to have involved other grounds, connected, indeed, with such mistake, but in respect of which Equity has always exercised the right to intervene, such as misrepresentation, undue influence, imposition or surprise.

Austin (*Prov. Juris. Determ.*, i., pp. 481-

482), while criticising the reason for the rule given by Blackstone, declares the real reason to be that if ignorance of law were admitted to be a ground of objection, "the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable." That is, of course, making it a matter of evidence, and basing its reason entirely on the difficulty of affirmative proof. Judge Holmes ("The Common Law," pp. 47, 48) combats Austin's theory, and says "the true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, etc. Public policy sacrifices the individual to the general good."

Even the Roman jurists, to whom we are indebted for this rule of law, did not clearly apprehend its reason. In the *Digest* (xxii. 6, 9) we find the maxim so expressed: "Regula est, juris quidem ignorantiam cuique nocere"; and its reason expounded in this wise (*Dig.* xxii. 6, 2): "In omni parte error in jure non eodem loco, quo facti ignorantia, haberi debebit: cum

jus finitum et possit esse, et debeat, facti interpretatio plerumque etiam prudentissimos fallat." We gather from this that the Romans rested the idea of responsibility under this maxim purely and simply upon negligence. What they say is tantamount to this—that a man must be held to be guilty of negligence who does not know *what is possible to be known*, for the law can and ought to be definite. (Cf. Hunter's "Introd. to Roman Law," 3rd ed., p. 660). How great a sophism this involves becomes clearly manifest when one recognizes what a *tour de force* is necessary in order to bring so artificial a postulate as this within the practical elements of negligence (*culpa*) in the Civil Law.

On the whole, I am inclined to think that Austin's view is the right one, in so far as he says that the rule is an arbitrary regulation, necessary to the effective administration of the law. If it is the pivot upon which the wheel of justice turns, then that ought to be a sufficient *raison d'être* for it even to 'the man in the street.'

MR. Edward C. Strutt, littérateur and art critic, some time ago had the good fortune to pick up, amongst a lot of old literary trumpery at a book-stall in Rome, an autograph letter of the celebrated Hugo Grotius to Isaac Vossius. I believe that any one who has given some attention to the study of International Law will be glad to read this missive from the hand of him who may well be styled the founder of the science. Mr. Strutt says that the writing is very small and cramped, and occupies but a little space of a large double sheet of paper, folded in the usual manner and sealed with red wax. It will be observed that Grotius refers to the famous feuds that were then in progress between the literati of the time, mentioning amongst the belligerents his friend Salmasius, with whom our own Milton was shortly after to wage Homeric conflict over the lawfulness of the execution of Charles I. Indeed this epoch witnessed a veritable literary aceldama, where Titans did each other to death. It is

Grotius Scripsit

pleasant to know that so great a jurist as Grotius was also reekoned as one of the aeutest theologians and philosophers of his age. In eommon with Erasmus, he thought that the great sehism of the sixteenth eentury might have been avoided if the dominant Church had been lenient with diversities of opinion in matters which did not entreneh upon the essentials of the primitive Christian faith. Crities of our own day rank him as one of the best modern writers of Latin verse; and his contemporary, Ménage, ealled him 'a monster of erudition.'

Here is Mr. Strutt's treasure-trove :

"Clarissime et Eruditissime Domine.—Gratias habeo pro parte ista libri de Americanis gentibus. Velim aliquis cui plus sit otii quam nunc est mihi meas coniecturas firmet aut adferat meliores. Certe quae Peruanis quum Sinensibus congruunt, plura sunt quam ut fortuito concursui tribuantur. Hoii liber multum hic legitur. Creditur in eo opere non Bezae tantum famam vindicasse, sed et gratificari voluisse D. Salmasio. Idem ille Hoius Petavium tractat indignis modis, is responsurum se negat ideo quod norit annua augeri ministris contra quos scribitur. Gernanes mire semper Heinsio favet. Quod Cloppenburgius mihi obiicit idem obiectum Erasmo fuit. Parabolae Evangelicae pleraeque sunt apologi modestiores in quibus non ferae aut pecudes loquuntur sed homines. Apologos autem Latini vocant fabulas, ut Phaedrus, Gellius, alii. De scriptis vestris gaudeo meum consilium clar. vestrae

probari. Livius Gronovii non dubito quin publice futurus sit utilis et gratus. Ad literas cl. vestrae in quibus erat folium Anthologiae, responsum mihi per D. Appelbonium. Velim servari formam chartae quae est in Hobaeanis et in Excerptis de Tragœdiis et Comœdiis. Cetera omnia vestro arbitratui permitto. Deus claritudinem vestram cum optimis mihique venerandis parentibus diu sospitet.

Lutetiae xviii. Martii MDCXLV.

Clar. Vestrae Studiosissimus, H. GROTIUS."

Broken Idols

THE opinion is frequently expressed by the older portion of the Bar that votaries of the 'New Law Learning' (which term I understand is to be taken to indicate the Law School, or 'scientific,' system of professional training)display an unseemly and splenetic interest in belittling the claim levied upon the veneration of posterity by those giants of the Common Law, Coke and Blackstone. The profane hand of the latter-day vandal, they say, is busy with destruction in our legal pantheon—majestic

ivory and bronze are being demolished to make room for cheap and tawdry foreign [Roman] clay! All this is to forget that the belittlement of Coke and Blackstone was not begun by the pupils of John Austin, nor by the adherents of Jeremy Bentham, for that matter. Bacon, his contemporary, impugned Coke's authority. Willes, C.J., (Willes, 341) in discrediting one of his legal propositions, says: "Some of them when they come to be thoroughly examined by those who are *nullius addicti jurare in verba magistri*, will be found not to be right." Buller, J., (3 T.R. 348) says of 4 *Inst.* 135: "I think that that part of Lord Coke's work has always been received with great caution, and frequently contradicted." Heath, J. (1 Bos. & P. 131) remarks: "In every part of his conduct, his passion influenced his judgment. I *acer et vehemens*. His law was continually warped by the different situations in which he found himself." As to Blackstone, we cannot forget the strictures of Fox upon the value of his constitutional views. Mackintosh (*Eth. Phil.* sec. 6) styles him "a feeble reasoner and a confused

thinker."Lord Redesdale (1 Sch. & Lef. 327) once observed:—"I am always sorry to hear Mr. Justice Blackstone's commentaries cited as an authority. He would have been sorry himself to hear the book so cited. He did not consider it such." Now this list of adverse criticisms might be very appreciably augmented in respect of both authors without straying into the fields of the 'New Law Learning,' but it is not to my purpose to do so. That purpose is effected by collating the above opinions merely, which, I submit, clearly exonerate modern preceptors of the law from the charge of initiating iconoclasm at the expense of old and unimpeachable authority. The pity is that in Jurisprudence there should be any attempt at apotheosis of authority; for when we look abroad at the other sciences we find that there are no names that stand for perpetual infallibility, but that sooner or later the time comes when the whilom brightest reputation can do no more than feebly and fitfully beacon to posterity over the chill waters of forgetfulness.

"EXISTE-T-IL une société juridique entre les hommes et les animaux ?" asks M. Henri Rolin in reviewing M. Engelhardt's book on the legal rights of the lower animals, (*De l' Animalité et de son Droit*). As the present writer's energies are more or less absorbed in exploiting the 'juridical relation' between man and man, he will not undertake to find an answer to M. Rolin's interesting query; but he would venture to suggest that M. Rolin take out an order to examine, viva voce, on the subject, Mr. Kipling's Shere Khan, or, better still, the shades of those leonine epicures of old times who had a playful habit of breaking in upon Oriental forensic functions, and lunching on the presiding magistracy. The subject is not a new one, for we bear in mind what Mr. Ernest Thompson Seton has to say about it in his preface to "Wild Animals I have Known," viz.: "Since, then, the animals are creatures with wants and feelings differing in degree only from our own, they surely have their rights. This

A Brutish Law

fact, now beginning to be recognized by the Caucasian world, was emphasized by the Buddhist over 2,000 years ago." But we do not expect to see a practical 'animal jurisprudence' such as M. Engelhardt speculates about, until the millennium has first ended 'man's inhumanity to man.' I suspect that the hard-headed votary of Themis to-day would look upon the advocate of such a propagandism as Goethe's "Werther" exhumed, or, possibly, an impersonation of the "Sentimental Shepherd" of whom the humourist sang :

"I sits wid me toes in a brook
And when they ax me : "For why ?"
I hits them a tap wid me crook—
'Tis sentiment kills me, says I !"

Scholarship at the Bar

SOME time ago a prominent man of letters in England deplored the decay of sound scholarship in the Imperial Parliament ; and really, when one compares the speeches of present day members with those delivered at Westminster a century ago, he is compelled to become an encom-

iast of times past. In the days of Walpole and Pitt, the speeches of the leading members of both Houses were, on all vital questions, splendid contributions to the world's record of public debate ; to-day who would ever seek for cultured rhetoric, or intellectual stimulus of any kind, in the pages of Hansard—more especially since we have lost Beaconsfield and Gladstone ? It would be hard, for instance, to imagine such an incident occurring nowadays as that which manifested itself in the classical duel between Walpole and Pulteney in 1741. Sandys had given notice to the House that he would at a named time bring certain charges against the First Minister. The latter, in repudiating the threatened accusation, theatrically laid his hand on his breast, and said with some emotion :

"Nil conscire sibi, nulli pallescere culpæ."

Pulteney immediately sprang to his feet and declared that the right honourable gentleman's logic was as bad as his Latin, and that Horace's exact words were : *Nullâ pallescere culpâ*. Whereupon Walpole wagered a guinea

that his quotation was right, and Pulteney aeeepted the ehallenge subjeet to the arbitrament of Mr. Hardinge, the seholarly Clerk of the House. The Clerk deeided against Walpole, who immediately threw the guinea to his learned adversary, who, deftly eatehing it, held it up to the House and exelaimed : "It is the only money I have reeeived from the Treasury for many years, and it shall be the last!" What is true of Parliament is equally true of the Bar—indeed the former must needs take its vogue from the latter, seeing that it so largely reeruits its ranks from the gentlemen of the long robe. The golden age of polite and philosophieal learning, so far as English lawyers in the mass are eoneerned, began with Sir Thomas More and ended with Lord Brougham—truly a long period. There are a few great seholars in the profession to-day, but they are seholars despite the methods under whieh they were bred to the Bar. There are many of the profession who say that this deeadenee is a mere phase of modernity whieh the law is pass ng through in eommon with other branehes of human aetivity—in other

words, an exploitation of the 'Art for Art's sake only' formula. But as the sole art which the average latter-day lawyer would seem to have any desire to become familiar with is the seductive art of money-getting, I suspect that his adhesion to it will wax rather than wane as the years go by. "If you wish to remove avarice," says Cicero, "you must remove its mother—*luxury*."

Criminal Law Practice

TO-DAY, the young Canadian lawyer who stands upon the threshold of practice feels that he must eschew the criminal courts if he would attain the good reputation that must be his who ultimately holds the highest rewards of his profession. Consequently, the practice of the most important branch of the law from the view-points of ethics and sociology—a branch of the law wherein hitherto many of the giants

of the English Bar have made their paramount fame—is nowadays, in this country, relegated to the shysters and 'brilliant-failure' men, with a few notable exceptions which only serve to emphasize the general correctness of my statement. There exists, then, a crying need for reform. But where shall it begin? Mr. Speranza, the writer of an interesting article in the *Popular Science Monthly* for February, 1900, on the "Decline of Criminal Jurisprudence in America," seems to be of the opinion that the initial step might be taken by the law-schools in the direction of a radical scientific reconstruction of their curricula touching the subject. But, while this would undoubtedly be helpful, we think a more thorough amelioration might be achieved if the legislature would endeavor to bring the criminal law itself into touch with the scientific advancement of the times, and so make it a province in which the thoroughly equipped specialist might find interest and emolument. It seems to us that then, and not till then, will the *odium populi* concerning the criminal lawyer become effaced, and the lawyer who is a

criminologist win the respect of an enlightened community.

Sir Thomas More points out in his *Utopia* how the Criminal Law of England had overreached itself by its inhumanity. Beccaria, in his *Trattato dei Delitti e delle Pene*, taught eighteenth century Europe that the criminal law ought to look to the prevention of crime rather than to its punishment; and prevention means more than making the severity of the law's sanctions a deterrent from crime. It means that an incipient bias to wrong-doing should not, by the committal of juveniles to promiscuous prisons, be hopelessly solidified into the criminous mental state. It also means that every accused person should have the benefit of intelligent discernment between his liability to punishment for a conscious infraction of the law, and his need of proper treatment for mental disease—demonstrated by his method of committing the crime, and his abnormal motive, or lack of motive, therefor. It means, in short, a considerable departure from the methods which Herbert Spencer stigmatizes as not only failing

to reclaim the malefactor, but which, in many instances, have increased criminality. We seem to have forgotten that education plays a large part in the reformation of the criminal.

But the superficial reformer points to the excellent features of our criminal code as compared with the state of the law at the beginning of last century, and airily bids us to fret not at the law's unavoidable delay, but be thankful for our present great advancement in dealing with the repression of crime. Undoubtedly we have progressed, but that is no reason why we should rest on our oars when so much remains to be done.

Besides this general arraignment of the method of the criminal law, specific instances might be given of its practical defects. I shall content myself with the mention of but one such defect. The test of criminal responsibility which our courts are bound to apply is that formulated by the judges in *McNaghten's Case* (*a*), which may be stated thus: The ability of the accused to distinguish right from wrong at the time of the offence. The judges

(*a*) 10 Cl. & F. 200.

practically say that it being once established that the prisoner's mental disease did not prevent him from knowing that what he was doing was wrong, then all evidence of insanity tending to destroy his freedom of will does not displace his criminal responsibility. Now, alienists to-day wholly repudiate such a criterion, and say the proper enquiry is, "Whether, in consequence of congenital defect or acquired disease, the power of self-control is absent altogether, or is so far wanting as to render the individual irresponsible? As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness, through cerebral defect or disease, to do right, is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the tread-mill or the gallows."(a) A writer in 12 *Criminal Law Magazine*, at p. 4, says: "The rule in *McNaghten's Case* is attacked because it holds a partially insane person as responsible as if he were entirely sane, and it ignores the

(a) Bucknill & Tuke's Psychological Medicine, 4th ed., p. 269.

possibility of crime being committed under the duress of an insane delusion operating on a human mind, the integrity of which is destroyed or impaired by disease, except, perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence." A purely artificial test established over fifty years ago may hardly be expected to have the approval of the latest scientific research.

Of course I am aware that this medico-legal dogma while having been adopted as law in some States of the American Union, has elsewhere been violently oppugned as tending to facilitate pseudo-defences to indictments for crime, and, consequently, to promote escape from legal punishment. But with the exactness of diagnosis now possible to the psychiatrist, the chances of successful deception on the part of the accused are extremely small; and again, no advocate of the scientific test of criminal responsibility suggests that any involuntary malefactor should be allowed to roam the community at large while there are insane asylums properly open for his reception. Many

mental irresponsibles have been murdered by *stare decisis* in the past ; let us assure ourselves, then, that we may properly take some risk on the side of greater humanity in the future.

THE publication of the fourth edition (1903) of Dr. Hunters' excellent work on Roman Law reminds me that the charge of 'looking to Rome' can now be applied with quite as much force to English lawyers as to some English churchmen.

Tout chemin mène à Rome

With the first appearance of Maine's *Ancient Law* the insular prejudice of the average English lawyer against the study of the great Roman system began to abate. He came to recognize that it was not the produet of mediеval monks; that Canon Law and Roman Law were not convertible terms; and, most astounding faet of all, that a very considerable portion of the foundation of the Common Law

was hewn in the Roman quarries. The writings of Bentham and Austin had prior to this, it is true, stimulated in England the study of the historical and philosophieal phases of Jurisprudenee ; but they were hard reading, and sought their constitueney in minds of an aeademie cast. Sir Henry Maine, on the other hand, plaees the treasures of his learning within the reaeh of all sorts and conditions of men in the profession. The scholar here finds an explieation of the recondite sources of modern law whieh disarms his eriticism, and, for the most part, eompels his assent; while the busy man of affairs, who ean only employ his spare moments in expanding his knowledge, is led over a broad and pleasant path to the desired goal, without having to flounder wearily through mazes of erabbed text and morasses of laboured foot-notes, whieh unsettle rather than inform the average mind. So, we repeat, it is to Sir Henry Maine that the honour belongs of broadening the views of the profession in England as to the history and philosophy of the law. And what Maine so admirably began has been zealously forwarded

by Markby, Holland, Pollock and Hunter. It is not too much to say of the latter that what Pothier and Savigny did for the study of the Roman Law in France and Germany, respectively, he has accomplished for it in England. He has opened for his fellow-countrymen the hitherto sealed door of the stately treasure-house of Roman jurisprudence,—treating it as a historical whole in the order of a code. Strange as it may seem, it is quite possible that ere long Blackstone will be displaced as the fetish of English law-students, and the devoirs of their bibliolatry accorded to Hunter's Roman Law.

THE dog-star rages once more, and the Courts are left to the undisturbed possession of their Long Vacation tenants — the moth and the spider. To those whom remorseless Fate compels to remain in town to be grilled by the heat, and stung beyond the bounds of endur-

Long Vacation

anee by the thousand and one ills that the mid-summer denizen of the eity is heir to, we extend our heart-felt sympathy. Few of us have reached sueh a stage of altruistie development that we ean rejoiee in the faet that while our own ears are maddened by the shrieks of the street-railway eurve, or the bravuras of the factory siren, our best friends are listening to the thunder of the surge upon some eool Atlantic beaeh, or being lulled to delightful siestas by the musie of the birds and the other harmonies of the fields. But woes of any kind are only aggravated by meditating upon them. It is a fatal mistake, for instanee, to read and ponder Sehopenhauer's diatribe against 'Noise' when one is suffering from an attaek of the nerves. *Le bon temps viendra !* And in the meantime we perspiring ones arc not altogether in desperate ease if, perehanee, we number among our clients the proprietor of an automobile livery.

IN *Revue de Droit International et de Législation Comparée*, for 1899, M. Alfred Giron published a most interesting essay under the title: "De la condition juridique des Juifs." There we have traced for us in a clear and impartial way the sad legal condition of the Jew in most European countries after the spread of Christianity. The unconverted Hebrew was by customary law regarded as the serf and slave of king or seigneur. He was debarred from holding land. He was denied the meanest privileges of citizenship. As a premium upon his embracing the Christian religion, his master was entitled in such event to confiscate his personal belongings. We know this 'coutume bizarre' to be a fact in France, says M. Giron, by the law which abrogated it, viz., the royal edict of April 4th, 1393. The position of the Jews in England was no whit better, and Matthew of Paris is quoted in reference to the stupendous exactions from them of that pusillanimous thief, King John. Passing in review the Jew-

The Jew and the Law

ish persecutions and slavery in Spain, Sardinia and elsewhere, well-known to students of history, M. Giron arrives at the eighteenth century, when, he says, the ancient severity of the laws against this long-suffering race began to be relaxed. In 1715 Abraham Aaron was admitted to the rights of a burgess in the City of Antwerp, and, later, this privilege was accorded to one Jacob Cantor. In 1758, however, the Belgian Jews received a set-back in their social progression by the decree that profession of the Catholic faith was to be a condition of admission to the rank of burgess. This restriction was removed by the Austrian Government in 1769. M. Giron further points out that while so late as the year 1753, when George II. proposed to Parliament a measure for the naturalization of the Jews, the low-class Londoner met the proposal with the dual cry : "No Popery ! No Jews !" yet they obtained the rights of the burgess in London in the year 1830, and the full privileges of English citizenship in 1858, thanks to the efforts of that distinguished scion of their race, Lord Beaconsfield. In France the Jew secured a

recognition of his claim to complete citizenship at the hands of the National Assembly in 1791. In 1831 the Jewish clergy were declared to be beneficiaries of the fund set apart by the French Government for the purposes of religion. And so M. Giron, having established that there is legal equality in France and other enlightened countries to-day between "les juifs et les non-juifs," claims that the former should be treated "non comme des pourceaux, mais comme des hommes : non comme des étrangers ou des ennemis, mais comme des frères et des concitoyens."

The Oddities of Reporting

LAWYERS familiar with the old English reporters will recall many curious comments by them upon the judges and judgments wherewith they had to do, which would be considered highly unconventional, to say the least, if indulged in by the reporters of our own times. For instance, we are amazed to hear Sir Harbottle Grimston, the son-in-law and first editor of Croke, announce that he has taken upon himself "the resolution and task of extracting and extricating these Reports out of their dark originals" [his father-in-law's hand-writing !], and to hurl at the 'dark originals' aforesaid the vituperative, if classical, epithet of 'folia sibyllina.' Then, perchance, if one's researches take him into 4 Leonard, 198, and 2 Rolle, 87, he will be astonished to find that a certain point of law was "agreed by the Court, and *affirmed by the Clarkes;*" and his wonderment over this anomalous court of appeal will not subside until he resorts to Lord Bacon's essay on 'Judicature,' wherein it is set down that "an ancient clerk,

skillful in preeedents, wary in proeeeding and understanding i.i the business of the Court, is an exeellent finger of a Court, and doth many times point the way to the Judge himself." Again, the old reporters did not eonfine their divagations to strietures upon the Judges, or glosses upon the preeedents reported by them; for sometimes we find them using the reports for the purpose of winging a eruel shaft against a brother seribe. Whoever has oeeasion to refer to Chief Justiee Anderson's report of *Shelley's Case*, will find the following (1 And. 71) :—"Nota—Le Atturney Master Cooke, ad ore fait report en print de eest case ove Argumentes et les Agreements del Chaneeler et auters Juges mes rien de e. fuit parle en le Court ne la monstre,"—which put into simple English means that Coke—the fetish of the old eommon lawyers—was an unmitigated liar in the opinion of one, at least, of his eontemporaries, forasmuch as "*nothing of this* [the arguments and rulings as stated by 'Le Atturney Master Cooke'] *was said in the Court, nor there declared.*" But of all the amusing deliveranees I have met with on the part of reporters in

ancient or modern times, I unhesitatingly pronounce the *gaucherie* of the reporters of the Supreme Court of Georgia, at p. 631 of 65 Ga., to be paramount. In reporting the case of *The Western & Atlantic Railway Company* v. *Jones*, at the plaee where English and Canadian reporters are wont to put their caption-lines, we find the following legend ; "JACKSON, CHIEF JUSTICE, *was providentially*[*!*] *prevented from presiding in this case.*" I venture to say that no plea based upon the idiosyncrasies of the English tongue would avail to save a Canadian reporter from the wrath of a judge whom he had subjected to so libellous an innuendo.

MR. Montague Crackanthorpe, in a valuable paper on the "Uses of Legal History," read before the American Bar Association in August, 1896, touched upon the evident disinclination of Sir Frederick Pollock and Professor Maitland to concede, in their "History of English Law," that the Roman Law was at any time introduced into England as a dominant system of jurisprudence; and he proceeded, very amiably and adroitly, to point out from their own admissions how paramount was its influence in that country at various epochs, reaching from the eighth or ninth century to the reign of Henry III, when a large proportion of its principles became woven into the woof of the Common Law, chiefly through the instrumentality of Bracton. Besides those admissions (to be found in the Introduction, pp. xxxi to xxxv; in Chap. III at pp. 55, 56, 72, 78, 80, 87; and in Chaps. IV, V, VI, Book I., passim) in Messrs. Pollock & Maitland's History which make to the contrary of their

Roman Law in England

contention, we would draw attention to the following statement by Professor Maitland, in his essay on Legal History, in Traill's *Social England*, i, p. 173. Speaking of the social progress of the Saxon period he says, "As a matter of fact we had not to work out our own civilization; we could adopt results already attained in the ancient world. For example, we did not invent the art of writing, we adopted it; we did not invent our alphabet, we took the Roman. And so again—to come nearer to our law—we borrowed or inherited from the old world the written legal document, the written conveyance, the will. The written conveyance was introduced along with Christianity. . . From the days of Æthelbert onwards English law was under the influence of so much of the Roman Law as had worked itself into the tradition of the Catholic Church."

It is not to be doubted that the law of Rome was the paramount and only system of law in Britain while it was a portion of the Roman Empire. Messrs. Pollock and Maitland seem to argue ("Hist. Eng. Law." i, p.

2)[a] from the fact that Justinian's *Corpus Juris* was not known in Britain before the Roman legions had been withdrawn, that, therefore, no undiluted streams from the fount of the Roman Law could have poured their waters into that country. But this would overlook the fact that there was a complete system of law is Rome long before Justinian codified it. Moreover, Selden tells us that Ulpian and Paul themselves held legal offices in Britain prior to its evacuation by the Romans; and Dion Cassius says that Papinian, the celebrated jurisconsult, once presided in the forum of York. It might also be mentioned that Mr. F. T. Richards, in his paper on Roman [illegible] Traill's "Social England," i, p. 24, [illegible] possibility of young British lawyers being trained at the great school of Augustodunum in Gaul. (See also Tacitus: "Annales," xii. c. 32; Güterbock: "Bracton und sein Verhältniss zum Röm. Recht," 60, 70, 73, and "The Roman Law in England," by J. E. Leonard, in 1 South. L.R., N.S., 433.)

(a) In the second edition of this work the passage containing the view here referred to is omitted. The above remarks are wholly referable to the first edition.

But, perhaps, the most telling argument against the view that the Roman Law found no important lodgment on English soil is the fact that the High Court of Admiralty since its establishment in the fourteenth century has exclusively administered the rules of Civil Law together with maritime customs.

It would seem that the weight of authority is against Messrs. Pollock and Maitland's opinion in this matter. *Quandoque bonus dormitat Homerus.*

WHILE women were not denied the privilege of pleading their own causes in the courts of Imperial Rome, they were expressly prohibited from appearing as advocates for others. The origin of this disability is a sad one, and shows at least that there was some traditional ground for the modern barrister's aversion to opening the door of his profession to the more rhetorical sex. Valerius Maximus tells us that there was a certain lady named Cafrania, wife of a senator, who was addicted to verbal onslaughts of so violent a character upon a certain prætor whenever she appeared before him, that in self-defence and in the interests of justice he made an edict forbidding all females from pleading for others in the courts of Rome. Valerius calls this disbarred lady the most shocking names, which we deem it prudent not to translate. This prætorial inhibition found its way into the "Pandects," where the reason for its promulgation is also stated in language quite as denunciatory of the em-

Women Pleaders in Rome

bargoed Cafrania as that above referred to. (See Dig. 3, 1, § 1, in Galisset's *Corpus Juris Civilis*). It would seem, however, that notwithstanding this ban upon female pleaders, the study of the law was regarded as a becoming pursuit by educated women in the reign of Justinian. Testimony of this fact is to be had in the following epigram by Agathias upon the death of his sister Eugenia, translated by Lord Neaves in his notes to the fourth edition of Lord Mackenzie's "Roman Law" :—

> "Blooming in beauty and in song before,
> *Skilled in the splendid truths of legal lore,*
> Here hid in earth Eugenia's seen no more.
> Venus, the Muse, and Themis, at her tomb,
> Cut their fair locks, in sorrow for her doom."

AS there is authority to show that women once pleaded before the Roman Courts, so we have it on record that they used to sit in the Anglo-Saxon Witenagemot or Parliament. Gurdon in his *History of Parliament*, tells us that in Wightred's great Council, held at Bcconceld in the year 694, the abbesses sat and deliberated with thc witas, and five of them signed the decrees of that Council, along with the King, bishops and nobles. Even so late as the reigns of Henry III and Edward I, abbcsses were summoned to Parliament. Thc right of ladies of quality to sit was still recognized in the reign of Edward III, when the Countesses of Norfolk, Ormond, March, Pembroke, Oxford and Athole were summoned "ad colloquium et tractatum" by their proxies. Why *by their proxies*, we wonder ? What was the reason of the change in the summons ? We believe there was no Hansard when these estimable ladies 'sat and dcliberatcd,' but if there was we should not have liked to have bcen a member of the staff.

Women in the Witenagemot

Wig, Bands and Gown

IT is commonly believed that the wig, bands and gown have constituted the forsensic habit of the legal profession in England from time immemorial, but the fact is they came into voguc at a comparatively recent date. The white linen bands are a survival of the prevailing fashion amongst gentlemen at thc time of the Commonwealth. The short wig dates from the Restoration ; and "thus it happens," says Mr. Inderwick in *The King's Peace*,(a) "that by a very perversity of conservatism, that head-dress, which in the seventeenth century was worn alikc by kings and courtiers, by clergymen and soldiers, by Jeffreys on the bench, and by Titus Oates in the dock, has become in the nineteenth century the distinct characteristic of the advocate and judge." Mr. Inderwick is also of the opinion that it was not until the middle of the reign of King Charles I that counsel under the rank of serjeant took to wearing silk or stuff gowns, and thus became 'gentlemen of the long

(a) P. 205.

robe.' Until the reign of James I the Bar in general seems to have had no official costume. The scarlet robes of the judges appear to date from a very much earlier period, and do not owe their origin to England. An old Florentine painting of the trial of Savonarola, which took place in 1495, represents the judges in robes of scarlet. The stern old puritans objected to the judges 'painting the town red' when they came on assize in their rubious toggery, and petitions were presented to the Protector, requesting that his judiciary should no longer be permitted to "affright the country with their blood-red robes, and their state and pomp." Richard II prescribed a judicial costume of green, but because the judges regarded this color as equivocal in its symbolism, or for some reason not appearing of record, it did not remain long in vogue.

THOSE who have read Robert Louis Stevenson's *œuvre posthume* "Weir of Hermiston" will be interested in Mr. Francis Watt's sketch of the hero's father —Braxfield, the 'Hanging Judge' —published in the *New Review* for 1896 ; and if they were attracted by the pleasant little rôle played by Lord Monboddo in the story, and desire to learn more about this eccentric judge and savant, they should read what Mr. F. P. Walton has to say about him in the *Juridical Review* for the same year. Stevenson takes liberties with both of these judicial personages, —Braxfield being made to appear just a little more brutal than he was in the flesh, while Monboddo is indued with a sweetness of disposition far more abounding than Dr. Samuel Johnson at least would have credited him with. Mr. Watt avers that many of the extraordinary stories told about the 'Hanging Judge' are apocryphal. We may also mention, by the way, that the Lord Advocate for Scotland not long ago wrote a letter to Mr. Sidney

The Hanging Judge

Colvin, Stevenson's literary executor, pointing out that it would have been impossible for the Lord Justice General to preside at the criminal trial suggested in "Weir of Hermiston," because at that time the office was merely an honorary and political one. As to poor Monboddo and his twelve mortal (for they predeceased him!) volumes on 'metapheesicks' and philology, who is not sorry for him? He thought he had a message to deliver to the world, but he took so long to say his say thereanent, that people went to sleep over it, and he never had electricity enough about him to shock them into consciousness again.

WE are all proud of the splendid axiom of our law that "England is too pure an air for slaves to breathe in;" but we are apt to assign the date of its enunciation to a much too early period in the development of our legal system. This august phrase was first uttered by the judges in *Cartwright's Case* in the eleventh year of Elizabeth's reign (*a*); but the principle that inheres in it did not become a sociological factor in English history until some time after that. The Anglo-Saxons imported the practice of slavery in its worst forms into Britain; and we are told that under their domination the peasants were sold like cattle, and given away as presents whenever their masters felt inclined to be generous. (*b*) Even that great reformer, Alfred, was not able to secure a larger betterment of the condition of the serfs than subsists in his enactment that a Christian slave, if

Slaves in England

(*a*) Rushworth's Hist. Collect., vol. 2, p. 468.

(*b*) Cf. Stubbs, Const. Hist., 4th ed., i, 83; and 1 Kemble's Saxons, 199.

bought, should be free after serving six years, unless he consented to remain a slave, when his master might "bore his ear at the Church door, and so ear-mark him as his own property." (*a*). The term 'villein' became substituted for that of 'slave' after the Conquest; but it was the merest euphemism until the reign of Edward I. It is sufficient to bring a blush to the cheek of the race who proudly sing: "Britons *never* shall be slaves!" to remember that the cardinal liberties obtained by Magna Charta were expressly limited to *free*men only. The *Mirror of Justices* naively avers that the serfs were omitted from the benefits of the Charter because they had nothing to lose (*b*). Then in the great struggle for the liberty of the subject that marked the reign of Charles I., we find such advanced democrats as Littleton and St. John declaring that the born freemen of the land were treated by the King and his minions as no better than villeins (*c*). Bacon in his

(*a*) Paterson's Lib. of the Subject, vol. 1, p. 490.
(*b*) See Selden Society's ed., p. 80.
(*c*) 3 St. Tr. 86, 1263.

"Maxims," (*a*) harbours the delusion that villeinage is part of the law of nature; while Sir Edward Coke (*b*) with apparent relish defines the status of the villein under Magna Charta to be somewhat below that of the brute. In *Sommersett's Case*, Mr. Serjeant Davy, *arguendo*, (*c*) makes a witty commentary upon the axiom which is the subject of our present enquiry. He there says :—"The air of England has been gradually purifying ever since the reign of Elizabeth." In that case a negro slave was brought before the King's Bench upon a habeas corpus, and after hearing argument the court discharged him from the custody of his master, whose ship was lying in the Thames. The report of the case is a valuable repository of learning on the subject. It is to be remarked, however, that in the year 1827 Lord Stowell did not find that the air of England had become so surcharged with the ozone of liberty as to enable him to declare that where a West India slave had accom-

(*a*) Reg. xi.
(*b*) 2 Inst. 28.
(*c*) 20 St. Tr. 79.

panied her mistress to Great Britain and then voluntarily returned with her to her home, the slave was forever purified of the taint of bondage by reason of her temporary residence on English soil (*a*).

(*a*) See 2 Hagg. Ad. Rep. 94.

NOTWITHSTANDING an honest desire to do justice to the memory of Sir Edward Coke, I am continually having my dislike kindled against him by meeting with examples of his small jealousy and caddishness such as the following. Being presented with an autograph copy of the *Novum Organum* (*Instauratio Magna*), he wrote under the great philosopher's autograph:—

Bacon Roasted by Coke

"Auctori consilium.
Instaurare paras veterum documenta sophorum,
Instaura leges justitiamque prius;"

while over the device of the ship passing under the pillars of Hercules he inscribed the sorry couplet:—

"It deserveth not to be read in schools,
But to be freighted in the ship of fools."

However it seems to be quite in accord with the eternal fitness of things that Bacon should be roasted by Coke; but beyond all doubt the former will be 'chewed and digested' by reading men, when the latter has burned wholly away on the ash-heap of forgetfulness.

BENTHAM and Austin, doubtless, deceived no one but themselves in their attempts to stigmatize judge-made law as a presumptuous usurpation of the function of the legislature, and subversive of the coherency and exactness of the written law.

Judge-made Law

It is true that under the English system of jurisprudence, judiciary law has a stronger *raison d' être* than under those systems which are based upon codes ; yet, notwithstanding the express prohibitions contained in such codes against prior decisions being treated as precedents in cases subsequently arising for determination, it will be found that the judges constantly refer to earlier decisions as guides and aids in reaching right conclusions in the matters in controversy before them. For instance, by the Prussian Code (Allgemeines Landrecht [Introd.] s. 6) it is declared that "the opinions of law professors and the views taken by prior judges shall not be in any way considered in future decisions." Yet so persistently have the judges referred to the opin-

ions of commentators upon this code, and to previous decisions thereunder, that a sort of *usus fori*, or customary law of the courts, has grown up under the name of 'Juristenrecht.' Again, Art. 5 of the French Civil Code, prohibits the judges from pretending to lay down general rules when giving their decisions ; but there is hardly a French decision that one takes up where he does not find the judge repeatedly referring to 'la doctrine et la jurisprudence,' and also discussing the case from what he designates 'le point de vue juridique.' It is idle to say that these opinions and 'points of view' do not exercise an important influence in the determination of new cases as they arise ; and it is difficult to see how, in the result, this custom materially differs from the English mode of deferring to precedents, no matter how strenuously that principle may be disavowed in theory. But this by the way.

After all said and done, English judiciary law is but a *mos artificii*, a usage of the trade, so to speak. For, as in every other department of human activity, there have, perforce, grown up certain recognized canons which govern its

operations, whether it be that of the carpenter with his rules as to scarfing and mortising, or that of the mathematician with his axioms and logarithms, so under our indeterminate system of jurisprudence the judges find it necessary to declare certain dogmas of procedure and principle to facilitate the determination of particular cases as they arise from time to time; and in order to avoid dissonance and confusion the points of law decided in such cases are crystallized into precedents. Until the legislature makes its enactments precise enough to meet every possible case arising thereunder both in respect of doctrine and procedure (and we think that day is somewhat distant), this usage of the courts must, of course, continue. Although we have in our statute-law no such splendid spur to judicial activity as that contained in the French Civil Code, Art. 4, to the effect that a judge who refuses to decide a case under the pretext of the silence, obscurity or insufficiency of the law, may be prosecuted for a denial of justice, yet our courts are expected to find the law covering a particular case, by hook or by crook, somewhere.

The reasonableness of judiciary law being thus conceded, the question arises, how far are the judges justified in exercising their undoubted authority to prescribe the law where the legislature has not spoken ?

In the older repositories of the Common Law there are to be found many judicial *tours de main*, superimposed upon the process of making precedents by, to use Sir Matthew Hale's phrase, "illations on anterior law;" and the resultant harvest of indisputably new principles is therein garnered. But courts now honestly endeavor to remember that their office is *jus dicere* only, instead of grandiloquently talking about this wise limitation of their powers, and, at the same time, using it as a cover to screen their excursions into the forbidden and seductive field of law-making, as their forensic forbears were wont to do.

In *Webb* v. *Rorke*, 2 Sch. & L. 666, a case decided so late as 1806, Lord Redesdale said : "If a case arises of fraud, or presumption of fraud, to which no principle already established can be applied, a new principle must be established to meet the fraud ; for the pos-

sibility will always exist that human ingenuity in contriving fraud will go beyond any cases which have before occurred."

If he meant by this, as it seems from the report he did, that a new principle can be enunciated without reference to any analogy it bears to one already existing, then he was altogether wrong.

An opinion more akin to the present attitude of the courts upon this question was stated by Lord Brougham in the case of *Leith* v. *Irvine*, 1 My. & K. 294, where he says :

"It is no part of the duty of this Court to alter the law, so as to accommodate it to the varying circumstances of society ; and that is law to me which I find established by those who have gone before me, whether by the legislature, or by my predecessors, in whose time the principles of the court have been reduced to a system. Neither the makers of the law will carefully perform their duty, nor will its expounders with adequate caution discharge theirs, if the former are made to believe that their deficiences can always be supplied by judicial misconstruction. My resolution is

to abide by what I find to be the law, whether it has been promulgated on the record of the statute, or of the court, and to leave the legislature to alter it, if alteration be required."

Furthermore, we may observe that of late years the courts have persistently refused to supply a *casus omissus* in an Act of Parliament, no matter how manifest the omission may be ; and they have generally declined to extend the operation of an Act beyond the plain meaning of the words used (See *Meharg* v. *Lumbers*, 23 O.A. at pp. 59, 60, and authorities cited).

IN these strenuous, not to mention stridulous, days when men seoffingly say that while the judges avow themselves unable to make law their ability to make law-*suits* is undoubted, when judgments seem only written to be derided, and the exercise of the right of appeal has become a sort of forensic pastime, how happy the judge who could say with Lord Chaneellor Hardwicke : "Whilst I presided in my court (20 years) I never had one of my decisions reversed, and but three of them appealed against."

Appeals Aplenty

Too great facility of appeal is fatal to strong judgments at first instanee, by relieving trial judges of the ultimate responsibility of doing justice between litigants. Although Lord Bowen's panegyrie (in *Reg.* v. *Justices of London*, [1893] 2 Q.B. 492) upon the English system of appeals in certain eases was pronouneed so lately as the year 1893, viz., "If no appeal were possible, I have no great hesitation in saying that this would not be a desirable eountry to live in," we would para-

phrase it as to present-day litigation as a whole in Canada by saying: "If a multiplicity of appeals were impossible, this would not be an undesirable country to live in."

Criminal Appeals at Common Law

THE privilege of a party in any legal proceeding, who feels himself aggrieved by the decision of the court of first instance, to appeal to a higher court carries us back to the very beginning of British institutions. "I may carry my plaint to the foot of the throne," was the proud boast of the medieval suitor.

In the time of the Anglo-Saxon kings the Witenagemot was the highest court of justice in causes civil as well as criminal. The late Professor Freeman was able to show (*a*) with great clearness, that in respect of its judicial

(*a*) Norman Conquest, v., pp. 386, 387.

capacity the House of Lords not only grew out of the Witenagemot but is, practically, an extension of it. The 'curia regis' of the Normans was but a committee of the Witenagemot, the latter having been transformed into the 'magnum concilium', which, in turn, after the admission of representatives from the counties, cities and boroughs, became known as the 'Parliament'. The 'curia regis,' which consisted of such ecclesiastics and barons as held high office in the royal household, together with such persons as were learned in the law, called *justitiæ* or *justitiarii*, was presided over by the King himself, or, in his absence, by the chief justiciar, and was the seat of supreme judicature, both original and appellate. Later on, when the 'curia regis' had transferred its original jurisdiction to the Chancery and the three Common Law Courts, the King, to whom, as fountain of justice, the subject, on the failure of the regular tribunals, had a right of appeal, retained his supreme appellate jurisdiction, and exercised it sometimes through his ordinary or standing council (the inchoate House of Lords), and sometimes through the

'magnum concilium,' or Parliament (*a*). Speaking of the appellate jurisdiction of the House of Lords, Blackstone says : "The House of Peers, which is the supreme court of judicature in the Kingdom, has at present no original jurisdiction over causes, but only upon appeals and writs of error ; to rectify any injustice or mistake of the law committed by the courts below. To this authority they succeeded of course upon the dissolution of the *aula regia* [*curia regis*]" (*b*).

In the earliest records of Parliament we find petitions to the King to remove causes from the ordinary Common Law courts into the House of Lords, but the only judicial proceeding by which matters of a criminal nature could formerly be brought there was by writ of error: (Arch. Crim. Prac. 197). Proceedings in error, which ultimately became the regular medium of appeal from the inferior to the superior courts of Common Law, had their origin in the thirteenth century. In Bracton's "Note

(*a*) Cf. Denison and Scott House of Lords Practice, xxv.

(*b*) Comm. iii., c. 4, p. 56.

Book," pl. 1166, we find perhaps the earliest recorded instance of judicial proceedings in error. There we are informed that in the year 1235, at the instance of the Abbot of St. Augustine's, Bristol, a case in which, so the good abbot opined, the 'Judges of the Bench' had been guilty of error, was brought 'before the King' (*coram Rege*). Thereupon, the judges having 'pleaded ignorance,' the judgment was set aside. *En passant*, what a refreshing thing it is to read of judges confessing their ignorance of the law!

The early books shew that there was some doubt whether writs of error lay as of right, or were granted by the King *ex gratia*.

Lord Holt, in speaking generally of the writ, is reported to have said: "A writ of error may be against the King without petition, though anciently that was used, and was a decency; but since 1640 writs of error have been made out *ex officio*:"(*a*) In *Cristie* v. *Richardson* (*b*), a much later case, Lord Ken-

(*a*) 1 Salk, 264.
(*b*) 3 T.R. 78.

yon said : "If it were fit that parties should be restrained from bringing writs of error, the legislature must interfere. But, by the constitution of this country, every subject has a right to have his cause reviewed by a court of error."

In 1705 the question was deliberately considered by the judges of the Queen's Bench. In 2 Salk. at p. 504 (*Reg.* v. *Paty*), we have the following report of the matter: "And now a new question was started and referred to the judges, whether the Queen ought to allow a writ of error in this or any other case *ex debito justitiæ*, or *ex mera gratia*? And ten of the judges were of opinion that the Queen could not deny the writ of error ; but it was grantable *ex debito justitiæ*, except only in treason or felony." In commenting upon *Reg.* v. *Paty* in *R.* v. *Wilkes*, (*a*) Lord Mansfield says : "This opinion in the 3rd of Queen Anne has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanor, if there be possible cause, it ought not to be denied : this court would order the Attorney-

(*a*) 4 Burr. at p. 2551.

General to grant his fiat. But be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive."

In chapter 30 of Book IV. of his Commentaries, Blackstone says: (*a*) "A judgment may be reversed by writ of error, which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers. . . . These writs of error to reverse judgments in case of misdemeanors are not to be allowed of course, but on sufficient probable cause shewn by the Attorney-General; and then they are understood to be grantable of common right and *ex debito justitiæ*."

Under the modern English practice in criminal cases a writ of error lies to the Queen's Bench Division of the High Court of Justice, where there has been a trial upon indictment, for every defect in substance appearing on the face of the record, for which an indictment might have been quashed, or which would have been fatal on demurrer or in arrest of judgment, provided such defect is not cured

(*a*) Pp. 391, 392.

by verdict, and provided no question of law has been reserved for the Court of Crown Cases Reserved, under 11 and 12 Vict., c. 78. It must be a defect in substance appearing on the face of the record, and not contrary to the record, for the record is an estoppel: *R.* v. *Carlile*, 2 B. & Ad. 362; *Ex p. Newton*, 24 L.J.C.P. 148; and it must be a final judgment. But in no case can the writ be issued until the fiat of the Attorney-General therefor has been first obtained (Short & Mellor's Crown Office Rules, 314, 317). The Attorney-General has discretion to withold a fiat: In re *Pigott*, 11 Cox. 311. An appeal from the Court of Appeal to the House of Lords on a judgment upon a writ of error can now only be had by leave of the Attorney-General and upon petition (The Appellate Jurisdiction Act, 1876, secs. 3, 4, 10 and 11).

So it will be seen that recent legislation instead of enlarging the 'old right' of appeal at Common Law has rather been in the contrary direction.

INDEX.

Finis